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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DORIS HELLER,

Petitioner,

v.

NORCAL MUTUAL INSURANCE COMPANY ET AL.,

Respondent.

Petition for Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner's right to privacy afforded to her by the United States Constitution was violated by Respondents' attainment and disclosure of information during a physician-patient relationship and the California Supreme Court's subsequent holding that Petitioner's complaint did not sufficiently allege a privacy violation.

2. Where an international treaty guarantees the right of privacy to individuals, can a state statute or state constitutional provision permit an insurer and a patient's treating physician to obtain and divulge nonrelevant, confidential information about that patient.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Doris Heller, who was the plaintiff, appellant, and petitioner and the Respondents, Norcal Mutual Insurance Company and Dr. Kent Yamaguchi which were the defendants, appellees and respondents.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Doris Heller, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the California Supreme Court entered in the above proceedings on July 25, 1994.

OPINIONS BELOW

The opinion of the California Supreme Court is reprinted in the appendix hereto, p. 1a., *infra*.

The opinion of the Court of Appeal of the State of California Fifth Appellate District is reprinted in Appendix hereto, p. 45a, *infra*.

JURISDICTION

Petitioner filed an action against the Respondents herein, and other parties who have since been dismissed, invoking her right to privacy under the California Constitution, Article I, Section 1, and the United Stated Constitution through the Fourteenth Amendment. The Fresno County Superior Court sustained Respondents' demurrer without leave to amend. On appeal to the Fifth District, the appellate court reversed the trial court's holding (see Appendix - California Court of Appeals Fifth District Opinion, p. 45a) as to Petitioner's seventh, eighth, ninth and twelfth causes of action of the Fourth Amended Complaint and ordered a writ of mandate be issued directing the trial court to vacate its January 31, 1991 order.

Respondents then filed an appeal to the California Supreme Court. Between the time the California Fifth Appellate District ruled on the Petitioner's appeal and the filing of the Respondent's appeal to the California Supreme Court, this Court decided *Hill v. NCAA* 7 Cal.4th 1 (1994), which was a case of first impression for the California Supreme Court in interpreting the California Constitution, Article I, Section 1, as applied to the Federal Constitutional right to privacy. The California Supreme Court applied this holding to Petitioner's case and reversed the Appellate Court's decision.

The jurisdiction of this Court to review the judgment of the California Supreme Court is invoked under 28 U.S.C. Section 1257(a).

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

Article 3, Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;. . .

Article 6, Section 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fourteenth Amendment

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA STATE CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 1

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, and acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

STATEMENT OF THE CASE

Petitioner Doris Heller was a patient of John Geis, M.D., a plastic surgeon, who committed medical malpractice when he improperly treated a staphylococcal infection which developed in her left hand after surgery for a bone spur. As a result of Dr. Geis' negligence, Petitioner developed the painful and debilitating affliction of reflex sympathetic dystrophy. Once his negligence was complete and the damage done, Dr. Geis called in Respondent Kent Yamaguchi, M.D., to assist in two amputations of Petitioner's fingers. On or about September 21, 1987, Dr. Yamaguchi became Petitioner's treating physician for her dystrophy. (Appendix - California Court of Appeals Fifth District Opinion, p. 48a.)

Petitioner filed a lawsuit against Dr. Geis on June 9, 1988, for professional negligence, against which he was defended by his medical malpractice carrier, Respondent Norcal. During the course of the Geis litigation and while Petitioner was being treated by Dr. Yamaguchi, representatives of Norcal - which also insured Yamaguchi - secretly met with Yamaguchi regarding Petitioner's case on several occasions. (Appendix - California Court of Appeals Fifth District Opinion, p. 48a.) These meetings took place outside formal discovery and on an ex parte basis. During those meetings, Dr. Yamaguchi and Norcal agreed that the former would obtain from Petitioner and release to Norcal his patient's "private intimate, personal, financial, and confidential medical information...in order to obtain an economic advantage" in the lawsuit against Petitioner. (Appendix - California Court of Appeals Fifth District Opinion, p. 49a.)

Additionally, as Petitioner alleged, Respondents conspired to modify Petitioner's medical care and treatment and tailor her medical records to minimize any appearance of negligence on Dr. Geis' part. Between June 15, 1988 and January 12, 1989, Dr. Yamaguchi also agreed - again ex parte - to act as Norcal's expert witness in the Geis litigation. (Appendix - California Court of Appeals Fifth District Opinion, p. 49a.) As part of the conspiracy between Respondents, Dr. Yamaguchi attempted to coerce Petitioner into settlement of her

case against Dr. Geis. He also met with Norcal representatives to formulate a "treatment plan and a psychological program to effectuate a settlement" of Petitioner's malpractice claim. (Appendix - California Court of Appeals Fifth District Opinion, pp. 49a-50a.) Eventually, Petitioner settled her lawsuit against Dr. Geis for $400,000.00. (Appendix - California Supreme Court Opinion, p. 4a.)

On August 22, 1989, Petitioner Doris Heller filed her initial complaint in this case against Respondents Dr. Kent Yamaguchi, Norcal Mutual Insurance Company, and Central California Faculty Medical Group, Inc., as well as against other defendants who have since been dismissed. After a series of demurrers and motions, Petitioner filed a Fourth Amended Complaint on November 21, 1990, which added Valley Plastic Surgeons Medical Groups, Inc. (Appendix - Appellant's Answer Brief on the Merits, p. 67a.) That complaint alleged, among twelve causes of action, that "Yamaguchi violated plaintiff's constitutional right to privacy by secretly disclosing confidential and private information to Norcal and its agents and employees." (Appendix - California Court of Appeals Fifth District Opinion, p. 53a.) Petitioner also claimed that Yamaguchi violated Civil Code sections 56.10, 56.20, and 56.26, subdivision (a). (Appendix - California Court of Appeals Fifth District Opinion, pp. 51a-52a.)

The Fourth Amended Complaint contained a First Cause of Action for post-conspiracy medical malpractice by Dr. Yamaguchi. (Appendix - Appellant's Answer Brief on the Merits, p. 70a.) That cause of action was not based on Dr. Yamaguchi's treatment of the injury which Dr. Geis had treated; but rather the modification of treatment which was part of the conspiracy between Respondents. This distinction - that Dr. Yamaguchi was never the target of Petitioner's lawsuit against Dr. Geis - was supported by the cause of action's express omission of paragraphs 8 through 14 of the general allegations which described Dr. Yamaguchi's co-treatment of Petitioner with Dr. Geis. Alternatively, the general allegation paragraphs 15 through 23 which were incorporated into the First Cause of Action limited this

cause of action to malpractice which occurred after Dr. Geis' malpractice was already complete. (Appendix - Appellant's Answer Brief on the Merits, p. 76a.)

Pleading that their actions were immune under California Civil Code section 47(b) - the so-called "litigation privilege" - Respondents demurred to all twelve causes of action. On January 31, 1991, the Fresno Superior Court granted most of Respondents' demurrers without leave to amend to all but the First Cause of Action for medical malpractice. In her response to Respondents' motion for reconsideration, which sought to eliminate all liability except the medical malpractice cause of action, Petitioner proposed a Fifth Amended Complaint and requested that she be allowed to amend. On April 8, 1991, the trial court granted all the relief requested by Respondents and sustained their demurrer without leave to amend. (Appendix - Appellant's Answer Brief on the Merits, p. 68a.)

The Petitioner appealed to the California Court of Appeals Fifth District on June 10, 1991, and additionally sought a writ of mandate compelling the trial court to set aside its orders sustaining the demurrers. The Fifth Appellate District consolidated the appeal with the mandamus action and on July 13, 1993 issued an Opinion which overturned the trial court's orders as to the violations of Civil Code section 56.10 et seq. and the Petitioner's right to privacy. (Appendix - California Supreme Court Opinion, p. 5a.) Specifically, the Court concluded that "a statute [Civ. Code § 47(2)] cannot immunize from liability conduct made actionable by the California Constitution." (Appendix - California Court of Appeals Fifth District Opinion, p. 60a.) In its opinion, the court drew attention to the "federal constitutional right of privacy":

> In discussing the relationship between the federal constitutional right of privacy and another portion of the section 47 privilege, Rancho La Costa, Inc. v. Superior Court (1980) 106 Cal.App.3d 646 [165 Cal.Rptr. 347] held: "Plaintiffs as private individuals are entitled to the protection of their right of privacy. That right is entitled to redress when violated. Under the mandate of the recent

> Federal Supreme Court rulings, the right of privacy is paramount to the right of free speech when in the exercise of free speech a defendant violates another's privacy by uttering a defamatory lie about him. The right of free speech guaranteed by the state and federal Constitutions does not permit violation of the right of privacy. It most surely follows that the privilege created by Civil Code section 47(3), a statute, and thus a law of lesser organic force, cannot be expanded to permit violation of that same right of privacy. Whatever privilege is accorded defendants under Civil Code section 47(3), it must yield to the plaintiffs' constitutional rights of privacy.

(Appendix - California Court of Appeals Fifth District Opinion, pp. 61a-62a.) The Fifth Appellate District also rejected Respondents' claims that Civil Code section 56.10(c)(4) rendered inapplicable the prohibition against disclosure set forth in Section 56.10 et seq. (Appendix - California Supreme Court Opinion, p. 6a.)

Respondents sought review by the California Supreme Court, which granted review without specifying any limitations by order dated October 21, 1993. In her Answer Brief on the Merits, Petitioner references her "constitutional right to privacy" under both the California and United States Constitutions. (Appendix - Appellant's Answer Brief on the Merits, pp. 90a, 91a, 93a, 94a, 96a, 97a, and 99a.) The California Supreme Court filed its Opinion on July 25, 1994. There, the court applied its recent decision in *Hills v. NCAA, suprs,* 7 Cal.4th 1 (1994) to the Petitioner's case. That application followed the path of the Federal Constitutional right through such United States Supreme Court cases as *Griswold v. Connecticut* 381 U.S. 479 (1965) and *Roe v. Wade* 410 U.S. 113 (1973). The *Hill* opinion also makes explicit reference to the constitutional right to privacy as developed by these cases. (Appendix - California Supreme Court Opinion, pp. 12a-15a.)

The California Supreme Court concluded that Petitioner had failed to state a cause of action under Civil Code section 56.10 because Respondents are exempted under section 56.10(c)(4). Additionally, the court concluded that Petitioner also failed to satisfy the three-

prong test in *Hill v. NCAA*, *supra*, in that "she does not plead that she has either a legally protected privacy interest, or a reasonable expectation of privacy, in information that would eventually have been discovered in litigation." Moreover, the court held that Petitioner did not allege a "sufficiently serious invasion of her privacy interest to warrant actionable relief under the privacy clause of our state Constitution." (Appendix - California Supreme Court Opinion, p. 16a.)

The majority opinion was written by Chief Justice Lucas. Justices Mosk and Kennard dissented.

REASONS FOR GRANTING WRIT

I.

PETITIONER'S FEDERAL RIGHT TO PRIVACY, WHICH WAS ADEQUATELY RAISED IN BOTH THE PETITIONER'S ANSWER BRIEF AND IN THE CALIFORNIA SUPREME COURT'S OPINION, WAS VIOLATED BY RESPONDENTS.

A. PETITIONER'S RIGHT TO PRIVACY AFFORDED TO HER BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS INFRINGED UPON BY RESPONDENTS' DISCLOSURE OF PERSONAL INFORMATION IN VIOLATION OF THE PHYSICIAN-PATIENT PRIVILEGE.

Petitioner requests review of the California Supreme Court's holding which deprived her of her fundamental right to privacy afforded to her by the Fourteenth Amendment to the United States Constitution. Historically, the United States Supreme Court has interpreted the Fourteenth Amendment to encompass rights within the area of personal autonomy - intimate relationships and decisions have been protected from state intrusion and are held to be implicit in the concept of ordered liberty. In *Griswold v. Connecticut* 381 U.S. 479 (1965), Justice Douglas noted that the Connecticut law at issue ". . . operates directly

on an intimate relationship of husband and wife and their physician's role is one aspect of that relation."

Justice Douglas, in his concurring opinion in *Doe v. Bolton* 410 U.S. 179, 208 (1973), noted that "[t]he right to seek advice on one's health and the right to place reliance on the physician of one's choice are basic to the Fourteenth Amendment values." (Emphasis added.) Lower courts subsequently adopted Justice Douglas' view of patient's rights as one of the penumbral privacy interests. In *Whalen v. Roe* 423 U.S. 49 (1975), the District Court below stated that "the intimate nature of a patient's concern about his bodily ills and the medication he takes are protected by the constitutional right to privacy." On subsequent review [*Whalen v. Roe* 429 U.S. 589 (1977)] this Court stated that a duty exists to avoid unnecessary disclosure of medical information, which was defined as dissemination by public health officials to a party who have no legitimate interest in the information. Justice Douglas recognized that the right to privacy protected by the Fourteenth Amendment encompasses the right to care for one's health and person and to seek out a physician of one's choice. (*Griswold v. Connecticut*, *supra*, at p. 219.)

When Respondent Dr. Yamaguchi clandestinely became an expert witness to testify against his own patient, Petitioner Doris Heller, and collected and disseminated confidential information for Respondent Norcal's financial benefit, he violated her Fourteenth Amendment right to privacy. Using Petitioner's lawsuit against Dr. Geis as a cover for his constitutionally violative acts, Dr. Yamaguchi misused Mrs. Heller's openness and trust in the physician-patient relationship to extract personal information unrelated to his prospective defense, to improperly modify her treatment plan, and to encourage early settlement of the Geis litigation. Such conduct represents a deprivation of a patient's fundamental right to choose her own physician and rely upon his advice.

In *Mills v. Rogers* 457 U.S. 291 (1982), this Court granted certiorari to determine whether an involuntarily-committed mental patient has a constitutional right to refuse treatment with antipsychotic drugs. The court declined to identify and rule on the specific liberty interests under the doctrine of abstention, but concluded that a mental

patient's right to refuse treatment with a certain drug gives rise to a liberty interest traditionally protected by the Fourteenth Amendment. Justice Douglas' opinion in *Griswold v. Connecticut* supports Petitioner's allegation that there exists a fundamental right to privacy in communications made during the course of the physician-patient relationship and that Respondents violated this right by their actions. Petitioner further asserts that the strongest protection available should be afforded when non-medical information (such as emotional and financial matters) is unnecessarily disclosed within this privileged relationship. Petitioner's relationship with Dr. Yamaguchi as her treating physician is an intimate relationship such as the one between the husband, wife and her physician in *Griswold* and should be similarly protected by the Fourteenth Amendment.

Respondent Dr. Yamaguchi's disclosure of information obtained during the course of confidential conversations protected by the physician-patient privilege violated Petitioner's Fourteenth Amendment right to privacy. The information Dr. Yamaguchi disclosed was not only irrevelant to Petitioner's malpractice action, but also to Dr. Yamaguchi's treatment of Petitioner's medical condition. Dissemination of this information does not fall within the statutory exception of the physician-patient privilege.[1] Norcal subsequently used this information to obtain a more favorable settlement in a malpractice action brought by the Petitioner against Norcal's insured, Dr. Geis.

As a direct parallel to Justice Douglas' concerns in *Doe v. Bolton*, Petitioner faced a crisis in her health care - the malpractice of her treating physician Dr. Geis - which necessitated she be able to seek out and rely on the physician of her choice. Through her new treating physician, Respondent Yamaguchi, Mrs. Heller could receive medical treatment and advice to ameliorate the debilitating physical and psychological effects of the reflex dystrophy caused by Dr. Geis' negligence. Like the family who faces the abortion decision unaided

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1 The waiver of the physician-patient privilege is contained in California Evidence Code section 996(a).

by the physician of their choosing, Petitioner was cared for by a spy for her legal opponent, the insurance carrier whose only goal was to limit the malpractice award.

The right to have non-medical information kept in confidence and protected from disclosure to non-interested parties is closely related to the right to choose one's physician without interference. State action in contravention of these rights not only invades constitutionally protected rights, but also hampers the free flow of information essential to adequate diagnosis and medical treatment. Respondents' actions in obtaining confidential information and placing it in the hands of parties possessing no legitimate interest in it resulted in the complete destruction of the confidence Petitioner placed in her physician. These actions constitute violation of privacy rights implicit in the concept of ordered liberty that are traditionally protected by the Constitution.

B. CALIFORNIA CIVIL CODE SECTION 56.10 ET SEQ. IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED BECAUSE IT VIOLATES PETITIONER'S RIGHT TO PRIVACY BY ALLOWING A TREATING PHYSICIAN TO DISCLOSE CONFIDENTIAL, NON-MEDICAL INFORMATION TO HIS MALPRACTICE INSURANCE CARRIER WHEN HE WAS NEVER THE TARGET OF ANY LAWSUIT INVOLVING HIS TREATMENT OF THE PETITIONER PRIOR TO THOSE DISCLOSURES.

The California Supreme Court has declared that California Civil Code section 56.10(c)(4) (hereinafter Section 56.10(c)(4)) provides a "permissive exception" to the Confidentiality in Medical Information Act (Civ. Code §§ 56.10 et seq.). As the court states, "as an associate of [Dr.] Geis, and plaintiff's treating physician, Yamaguchi was certainly at risk of medical malpractice exposure. Indeed, that risk became a reality when plaintiff filed the present action against Yamaguchi and included a cause of action for professional negligence, which is still viable and not at issue in this appeal. Accordingly, as a potential litigant in a malpractice action *and* a provider who "may

incur" malpractice liability, Yamaguchi was permitted to discuss with Norcal plaintiff's medical condition under section 56.10(c)(4)."[2]

Accordingly, the court has interpreted Section 56.10(c)(4) such that any of Petitioner's treating physicians who possess confidential medical or non-medical information may communicate that information to any organization "responsible for defending professional liability" - so long as they "may incur" liability for their actions.[3] Since any physician "may incur" liability during the course of treating his or her patients, the California Supreme Court has rendered the exception contained in Section 56.10(c)(4) an unconstitutional infringement into the physician-patient relationship. Based on the state court's interpretation, litigants like Norcal may now approach treating physicians and gather non-medical information whose only pertinence is in limiting (or defeating) medical malpractice awards.

Such an interpretation offends the Petitioner's right to choose and rely upon the physician of her choice, which this Court has recognized as a fundamental right under the Fourteenth Amendment of the Constitution.

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2 What has escaped the court's attention is that Dr. Yamaguchi was never a target of the malpractice action against Dr. Geis, since the surgery which they both performed occured after the latter's malpractice. The court's attempt to bolster its interpretation of Civil Code section 56.10(c)(4) by pointing to the fact that Dr. Yamaguchi was ultimately sued for medical malpractice ignores - at the successful urging of Respondents - that Petitioner's medical malpractice cause of action against Dr. Yamaguchi expressly excludes his pre-disclosure care and treatment, i.e., during the pendency of Dr. Geis' care. (See Appendix - Petitioner's Answer Brief on the Merits, p. 75a.)

3 In his dissent, California Supreme Court Justice Mosk accurately stated that, notwithstanding the ungrammatical interpretation used by the majority of the court, "there is certainly no evidence that Dr. Yamaguchi was defending *his* professional liability when he made the disclosures--nor am I aware of any evidence in the record before us establishing that Dr. Yamaguchi actually 'might incur' malpractice liability at the time he made the disclosure." (Appendix - California Supreme Court Opinion, p. 21a.)

C. THE ACTIONS OF RESPONDENTS COUPLED WITH THE DECISION OF THE STATE SUPREME COURT PROVIDE THIS COURT WITH STATE ACTION SUFFICIENT TO RULE ON THE CONSTITUTIONAL VIOLATION.

Respondent Norcal, through its actions as a state regulated carrier of medical malpractice insurance, violated Petitioner's Constitutional right to privacy. As a licensed provider in the State of California, Respondent's actions constitute state action. Due to the rapidly expanding concepts of tort liability in the State of California, the California legislature has enacted specific and comprehensive regulatory schemes with which all malpractice insurance carriers must comply in order to engage in the underwriting of malpractice insurance in California. These regulatory schemes include, but are not limited to, elaborate rules surrounding creation of a membership association, known as the Joint Underwriting Association, which is the exclusive agency through which medical malpractice may be written; the purpose of such association; rates which may be charged; and size and term of the board of directors of the association. The California Insurance Commissioner also regulates the association's plan of operation which must be approved by the Commissioner before the provider can operate in the State of California. (California Insurance Code Sections 11890 et seq.)

The California legislature enacted these regulations to enable malpractice carriers to enter the California market. The legislature recognized that without the State's intervention and control of insurance carriers, the voluntary market for medical malpractice insurance would be seriously affected. (See California Stats 1975 ch 93, effective May 23, 1975.) Without the availability of malpractice insurance, adequate medical care in California would be seriously affected.

Respondent Norcal, as a member of this association, falls within the State's highly statutory scheme. Respondent is one of few medical malpractice insurance carriers in the State of California who have been authorized to underwrite insurance. Although the Court has been reluctant to find state action based solely upon the State's conferral

of a monopoly, it has been suggested that the monopoly factor weighs heavily in determining whether constitutional obligations can be imposed on formally private entities. (*Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944).) Further, the State's statutory pattern makes it amply clear that it expects malpractice insurance carriers to behave more like governmental entitles than private corporations. As such, the actions of Norcal are so entwined with the State's actions of regulation and supervision of these parties as to be imputed as state action.

Through judicial interpretation and enforcement of California's State Constitution in violation of the Federal Constitutional right to privacy, the state court's actions constitute state action. It has been consistently held by this Court that judicial enforcement of substantive common-law rules formulated by those courts that violate rights guaranteed by the Fourteenth Amendment constitute state action. (*Federation of Labor v. Swing*, 312 U.S. 321 (1941).) In the case at bar, the California Supreme Court was called upon to interpret the California Constitution, Article I, Section 1 as developed by the California legislature. This Section was formulated and designed within the scope of the Fourteenth Amendment right to privacy. As an addition to a state constitution, these rights must be equal to or more expansive than those found in the Federal Constitution. As interpreted by the California Supreme Court, however, these rights are less protective of one's privacy rights than is the Federal Constitution. The state court formulated a three-prong test which parties must meet in order to plead a violation of one's right to privacy. The California Supreme Court stated that "a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish" each of the three prongs. A Defendant, on the other hand, may prevail "by negating any of the three elements. . . or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests." (*Heller v. Norcal* (1994); Appendix, p. 1a) Petitioner's privacy interests in communications with her treating physician which are irrelevant to any proceedings should at the very least require a showing which meets the "compelling state interest" test before they may be violated.

It has also been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of State Courts. (*Shelly v. Kramer*, 334 U.S. 1 (1948). The state court has violated Petitioner's rights as guaranteed by the Fourteenth Amendment by sustaining a demurrer. The court, in its holding, stated that Petitioner was not going to be given the opportunity to replead her case as she had failed to state an unreasonable expectation of privacy, which is prong two of the three prong test.[4] The court, in its formulation of this test, stated that "whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact." (*Hill v. NCAA* 7 Cal.4th 1, 40 (2994), emphasis added.) However, contrary to the test, the court in this case sustained the demurrer, stating as a matter of law that Petitioner failed to state a cause of action. The difference between the rule as stated and the rule as applied denies the Petitioner the right to present the issue to a fact-finder. The state has therefore affirmatively acted to deny Petitioner her rights as guaranteed by the Fourteenth Amendment.

D. THE STATE COURT'S DECISION ADEQUATELY AND APPROPRIATELY RAISES AND RULES ON THE CONSTITUTIONALITY OF CALIFORNIA'S RIGHT TO PRIVACY IN THIS CASE THROUGH ITS APPLICATION OF THE *HILL* TEST AND THE RECORD SUPPLIED THEREIN.

Petitioner requests review of the lower court's holding based

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4 Another defect of the majority opinion was remarked upon by Justice Kennard when she said , "[t]o conclude, as the majority and Justice Mosk do, that all of the confidential material Yamaguchi disclosed to Norcal was directly relevant to plaintiff's malpractice claim against Dr. Geis and essential to that claim's fair resolution is sheer speculation, and improbable speculation at that. In particular, it is difficult to conceive how financial information, disclosed in confidence in the course of the doctor-patient relationship, could have any direct relevance to plaintiff's malpractice claim against Dr. Geis." (See Appendix - California Supreme Court Opinion p. 36a)

upon a violation of the United States Constitutional right to privacy. The phrase "constitutional right to privacy" as set forth in Petitioner's Brief on the Merits to the California Supreme Court is used in reference with the United States Constitution as well as the California Constitution. (Appendix - Appellant's Answer Brief on the Merits, pp. 90a, 91a, 93a, 94a, 96a, 97a and 99a). Further, the California Supreme Court's holding purports to construe the Federal Constitutional right to privacy based upon the California Constitution, Article I, Section 1.

As discussed in the California Supreme Court's decision in *Hill v. NCAA* 7 Cal.4th 1 (1994) (hereinafter referred to as *Hill*), although the California Constitution contains its own privacy protections, those provisions are designed to provide privacy protections that are equal to those found in the United States Constitution (*Hill, supra*, at pp. 29 and 30.) Further, the *Hill* court extensively explained that the privacy protections found in the California Constitution were based on the Federal Constitutional right to privacy (p. 23). The *Hill* court followed the path of the Federal Constitutional right through cases such as *Griswold v. Connecticut* 381 U.S. 479 (1965) and *Roe v. Wade* 410 U.S. 113 (1973). The *Hill* court stated that the California Constitution, Article I, Section 1 was prepared from and makes explicit reference to the Federal Constitutional right to privacy as developed by these cases (*Hill, supra*, at p. 28).

In *Dewey v. Des Moines* 173 U.S. 193, 197 (1899), the court held that under the enlargement doctrine, "parties are not confined to the same arguments which were advanced in the courts below upon a Federal question there discussed." (*Dewey v. Des Moines, supra*, at p. 198.) If a federal question presented to the Supreme Court is one that only requires "enlargement of one mentioned in the State Court, or if it were so connected with it in substance as to form . . . we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued." (*Ibid.*; emphasis added). The Federal question must only be brought to the attention of the court below in some manner. (*Ibid.*; emphasis added.)

The *Hill* test was explicitly created through the enlargement of the federal right to privacy. Further, as stated by the court, the California Constitution, Article I, Section 1, is directly connected to the Federal Constitutional right to privacy. The California Supreme Court has thoroughly discussed the Federal Constitutional connection to this Initiative in *Hill*.

More recently, it has been held that the rule, now entitled "not pressed or passed upon below", is merely a prudential restriction and does not pose a bar to appellate review. (*Illinois v. Gates* 462 U.S. 213 (1983).) This Court looks to the record established in the lower courts as well as comity to the states to determine the prudence of its jurisdiction to review a constitutional issue. Petitioner contends that a well-developed record exists through the California Supreme Court's application of the three prong test established in *Hill*. Since this test was created through analysis of the federal case law surrounding the right to privacy, this Court need look only to *Hill* as applied to the case at bar on the issue of violation of Federal Constitutional privacy rights.

Finally, in *Cardinale v. Louisiana* 394 U.S. 437, 438-439 (1969), it was held that "no particular form or words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time." The instant case is in line with that statement in that the state court, by application of the *Hill* test, had an opportunity to rule the issue of whether the California Constitution, Article I, Section 1 was violative of the Federal Constitutional right to privacy. Therefore, the Federal Constitutional right to privacy, as applied in the case at bar, was adequately raised in the state court to justify review by this Court.

II.

WHERE AN INTERNATIONAL TREATY GUARANTEES THE RIGHT TO PRIVACY TO INDIVIDUALS, CAN A STATE STATUTE OR STATE CONSTITUTIONAL PROVISION PERMIT AN INSURER AND A PATIENT'S TREATING PHYSICIAN TO OBTAIN AND DIVULGE NON-RELEVANT, CONFIDENTIAL INFORMATION ABOUT THAT PATIENT?

A. A TREATY, RATIFIED AND EFFECTIVE AS OF SEPTEMBER 1992, PROVIDES AN INDEPENDENT BASIS FOR A GUARANTEE OF DOMESTIC PRIVACY, AND IS THE SUPREME LAW OF THE LAND UNDER ARTICLE VI OF THE UNITED STATES CONSTITUTION.

The International Covenant on Civil and Political Rights [opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, adopted by the United States Sept. 8, 1992)] (hereinafter ICCPR), is a treaty agreed to by over 117 nations. The full United States Senate, without objection, gave its consent to ratification on April 2, 1992. The treaty became law as ratified on September 8, 1992. Article VI, sec. 2 of the United States Constitution gives the treaty the weight of "supreme Law of the Land." The State Department published notice of the treaty ratification in the Federal Register August 31, 1993. (58 Fed.Reg. 45934.)

Petitioner's case did not survive the pleading stage. On November 20, 1990, petitioner filed her Fourth Amended Complaint For Damages alleging, *inter alia*, various invasions of privacy founded on state disclosure statutes and on state and federal Constitutional rights to privacy. In her answer brief filed with the California Supreme Court, Petitioner cited applicable federal Constitutional privacy cases as well as cases citing the California Constitutional right to privacy. The California Constitutional right to privacy states that, "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, and acquiring, possessing, and protecting property, and pursuing and obtaining safety,

happiness, and privacy." and that state right has been held by California courts to encompass and include the outer perimeter of the federal Constitutional right to privacy as it existed prior to the treaty.

The chronology of this litigation is needed to show at what point during the appeal process the ICCPR treaty became effective. Petitioner filed her Fourth Amended Complaint on November 20, 1990. On January 31, 1991, the trial court sustained, *inter alia*, Respondents' demurrer as to the 7th, 8th and 12th causes of action without leave to amend. On December 2, 1991, Petitioner filed Appellant's Opening Brief with the California Court of Appeal, Fifth District, attempting by writ and appeal to reverse the trial court's sustaining of the demurrers. At the time Petitioner had filed its opening brief on December 2, 1991 with the Fifth Appellate District, the ICCPR had not yet been ratified or deposited. On July 13, 1993, the Appelate Court issued its opinion, reversing the trial court's ruling which had sustained the demurrers as to the 7th, 8th and 12th causes of action and granting leave to amend. By the time the Court of Appeal had reversed, the ICCPR had become the supreme law of the land (treaty effective September 8, 1992), though the Court of Appeal did not mention the ICCPR in its ruling on its own judicial notice and the U.S. State Department had not issued its notice in the Federal Register, which it subsequently did on August 31, 1993.

Respondents then sought reversal of the appellate court in the California Supreme Court. On September 13, 1993 Petitioner answered Respondent's petition for review in the California Supreme Court (Appendix - Petitioner's Answer Brief on the Merits, pp. 66a), and made its first argument to the California Supreme Court that Respondents had violated Petitioner's Constitutional right to privacy, both under the State and Federal Constitutions. Petitioner's privacy arguments corresponded with the allegations in Petitioner's Fourth Amended Complaint in causes of action 7, 8 and 12. By that time, the ICCPR's privacy provision was in effect and was controlling over any conflicting prior state statutes or state constitutional privacy provisions, but had only been published and made officially known two weeks earlier in the Federal Register.

Though not expressly mentioned in the briefing before the California Supreme Court, Petitioner advances that this Court has jurisdiction to interpret the right of privacy under Article 17 of the ICCPR as an enlargement of the privacy argument contained in Petitioner's briefs before the California Supreme Court. The ICCPR derives its domestic applicability through the supremacy clause of the Constitution and, as such, is included within the traditional penumbral rights of privacy that existed at the time of the California Supreme Court briefing and prior to the decision of the California Supreme Court on July 25, 1994, which reversed the Court of Appeal and sustaining Respondents' demurrers without leave to amend. The ICCPR right of privacy, though given its force and effect through the supremacy clause of the Constitution is a separate federal right of privacy which petitioner respectfully requests this court now interpret in light of narrower and restrictive California state statutes on privacy disclosure and the California Constitutional Article I, sec. 1 right of privacy .

In California, pursuant to California Evidence Code sec. 452, the Supreme Court had the discretion to take judicial notice, *sua sponte*, of the ICCPR but did not mention it in its decision. The California Supreme Court was aware of the ICCPR, prior to ratification, and had cited the ICCPR in two decisions concerning the criminal justice provisions in the ICCPR (*People v. Ghent* 43 Ca.3d 739, 781, 739 (1987); *People v. Levins* 22 Cal.3d 620, 625, 586 (1978)).[5]

The treaty provides to all citizens of the signatory nations the rights set forth in the Bill of Rights, and additionally, in Article 17, guarantees to all individuals an express right to privacy. Under Article 17, sec. 1 of ICCPR, every United States citizen is guaranteed freedom

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5 Examination of the ICCPR's history illustrates at least some of the difficulty Petitioner faced in determining and locating the law applicable to her action. In the case of a little- publicized international treaty these difficulties are magnified. The text of an international treaty is not published in the United States Codes or the Statutes at Large. Other than notice in the Federal Register, there is no other widely-circulated domestic source available by which to ascertain such a treaty or its official language.

from ". . .arbitrary or unlawful interference with his privacy, family, home or correspondence. . .." Article 17 sec. 2 provides to every citizen ". . .the right to the protection of the law against such interference or attacks." The scope of the Article 17 privacy provision has yet to be interpreted by this court and thus this case is one of first impression. Petitioner respectfully requests that this court find that like the Thirteenth Amendment prohibiting slavery, this newly-created federal privacy interest applies to both state and private action and therefore individuals may invoke the treaty to protect their civil interests. This privacy right is not found in any federal statute. Article 5 of the ICCPR further provides:

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right toengage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

When the ICCPR's Article 5 application to individuals is read together with the specific right of privacy guaranteed to all citizens under Article 17, an express federal right of privacy to each citizen is granted. This grant is protected against interference by individuals, groups and the State.

Respondents interfered with Petitioner's right to privacy by disclosing information pertaining to Petitioner's emotional and economic status in order to compel Petitioner to accept an early and less costly settlement in her underlying malpractice suit against Respondent Dr. Yamaguchi's associate, Dr. Geis. Petitioner further alleges that the interference with her privacy occurred after Respondent Dr. Yamaguchi agreed, without Petitioner's knowledge or consent, to act as Norcal's expert witness in the malpractice action settlement. At the time these disclosures were made by Respondent, Petitioner had not pursued any legal action against Dr. Yamaguchi.[6]

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6 See Section I(B), fn. 2, *supra*.

In the state courts, Mrs. Heller presented arguments based on relevant cases interpreting both the Federal and California constitutional rights of privacy. The scope of this privacy right is further broadened by application of Article 17 of the ICCPR. Petitioner's allegations of violation of her privacy right allows her to rely on the ICCPR as an enlargement of this right to be argued before this Court. (*Dewey v. Des Moines, supra,* 173 U.S. 193 (1899).) The ICCPR right of privacy, though given its force and effect through the Supremacy Clause of the Constitution, is a separate federal right which Petitioner respectfully requests this Court to interpret.

B. THE COURT SHOULD FIND THAT THE COVENANT IS SELF-EXECUTING DUE TO THE SENATE'S CHARACTERIZATION OF THE NON-SELF-EXECUTING CLAUSE AS AN UNDERSTANDING RATHER THAN A RESERVATION.

The Restatement (Second) of Foreign Relations Law of the United States (1965) (hereafter the Restatement) Section 154(1) states that the courts shall determine the self-execution status of an international treaty. This follows the U.S. Constitution judicial review doctrine first set forward in *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803). The Court has found covenants to be self-executing in the past in *U.S. v. Percheman* 32 U.S. (7 Pet.) 51, 82 (1833) and *Burgess v. Gray* 57 U.S. (16 How.) 48, 50 (1856). Although they contained words to the effect ". . . shall be ratified and confirmed . . ." which would presage a future legislative act, the parties involved could actually intend that they ratified and confirmed by ". . . force of the instrument itself." In the present case the Covenant on Civil and Political Rights in its Preamble and in Article 2, specifically set forth the intention of the Covenant to grant individuals a remedy for State interference with any of the enumerated rights, and shows the intent of the drafters to make the treaty self-executing with respect to an individual's right to seek a judicial remedy.

In a case out of the Ninth Circuit, *Saipan v. United StatesDepartment of the Interior* 502 F.2d 90, 97 (1974) the court held that:

> The extent to which an international agreement establishes affirmative and judicially enforceable obligations without enabling legislation must be determined in each case by reference to many contextual factors: the purpose of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution.

In that case the court heard an appeal by the citizens of Saipan to enjoin the construction of a hotel which would destroy the environment of a large area of the island. In the present case the right to privacy of not only the petitioner but of every other medical patient in California is at issue. For this reason the Court should exercise its power under Article III and Article VI, clause 2 of the United States Constitution and declare that the ICCPR is a self-executing treaty under the intent of Article 2 and Article 5, clause 2 of the said treaty. "Whether an international agreement of the United States is or is not self-executing is finally determined by courts in the United States if the issue arises in litigation." (Restatement Section 154(1).)

C. THE SENATE DECLARATION OF NON-SELF-EXECUTION IS VOID PURSUANT TO INTERNATIONAL LAW AND PAST DECISIONS OF THIS COURT.

Restatement Section 303 comment (d) declares that any Senate addition other than a Reservation would not become "the Law of the Land," i.e., a non-self-executing treaty. Here, the non-self-execution declaration would immediately place the United States in violation of

the ICCPR. Former President Bush's intent in including the declaration was to remove an individual's right to access to the courts afforded by the treaty. His action was in direct contravention of Article 5, section 2 of the ICCPR. This action also negates the obligation of a signatory to adhere in good faith to its treaty obligations.

Federal courts have decided one case on the issue of the validity and effect of a Senate declaration on an international treaty. The Court of Appeals for the District of Columbia Circuit in *Power Authority v. Federal Power Commission* 247 F.2d 538 (D.C. Cir. 1957) held that a qualification statement, other than a reservation, made by the Senate in a resolution of consent had no force as domestic law. The court also held that a reservation consented to by the Senate and ratified would become part of the treaty and therefore "Law of the Land" under Article VI, clause 2. The Supreme Court has found that Congress can make domestic law which would amend the treaty as applied domestically, but to do so they would have to follow the legislative procedures set out in Article I, section 7, clause 2. The requirement for bicameralism in the adoption of legislation has been well established in *Immigration and Naturalization Service v. Chadha* 462 U.S. 919 (1983). Therefore, the declaration cannot even be considered as valid domestic law without the concurrence of the House of Representatives and the signature of the President (U.S. Const. Art. I, sec. 7, cl. 2, *Morrison v. Olson* 487 U.S. 654 (1988)).

D. AS THE COVENANT ON CIVIL AND POLITICAL RIGHTS HAS BEEN RATIFIED BY THE UNITED STATES, THE PRIVACY RIGHTS OF PETITIONER AND OTHER MEDICAL PATIENTS ARE THE SUPREME LAW OF THE LAND, AND ANY STATE ACTION WHICH TENDS TO BURDEN THESE RIGHTS SHOULD BE EXAMINED WITH THE HIGHEST SCRUTINY.

The actions of the courts of California in granting the Respondents' demurrer and dismissing Petitioner's privacy causes of action without leave to amend deprived the petitioner of her right to privacy without substantive or procedural due process. Petitioner should be protected against such action under the XIV amendment of the United States Constitution just as her rights would be protected under the Bill of Rights in the Federal system. (*Malloy v. Hogan* 378 U.S. 1 (1964).) The Court has always considered that fundamental rights and certain protected liberty interests are due the highest protection from state burden by either legislation or court action. The Court has followed this tradition whether the protected interest was a property right (i.e., *Nollan v. California Coastal Zone Commission* 483 U.S. 825 (1987) and *Dolan v. City of Tigard* ___ U.S. ___, 129 L.Ed.2d 304, 114 S.Ct. 2309, 62 U.S.L.W. 4596(1994)), or the right of a couple to use contraceptives, i.e. , *Griswold v. Connecticut*, *supra*, and *Eisenstadt v. Baird* 405 U.S. 438 (1972). In this case the right of Petitioner to expect a right of privacy concerning her conversations with her physician, even while in the midst of a malpractice suit against another doctor, must be given the same protections afforded other constitutional or statutory rights.

III.

CONCLUSION

This total destruction of the confidence placed in one's physician violates the basic values implicit in the concept of ordered liberty. The right to choose one's physician without interference is directly related to the right to keep in confidence irrelevant, non-medical information from non-medical parties who have no legitimate interest in such information. A rule stating otherwise not only violates one's right to privacy, but hampers the free flow of information which is essential to adequate medical treatment and diagnosis.

Additionally, the foregoing arguments show that the Court should declare the Covenant on Civil and Political Rights a self-executing instrument and that under Articles 2, 5(3)(b), and 17, Mrs. Heller's right to privacy was abrogated by the courts of California when they refused to allow her to amend her complaint.

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DORIS HELLER,

Petitioner,

v.

NORCAL MUTUAL INSURANCE COMPANY ET AL.,

Respondent.

Petition for Writ of Certiorari to the California Supreme Court

APPENDIX

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Attorney for Petitioner

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

DORIS HELLER,	
Plaintiff and Appellant,	
v.	S034539
	CT.APP.F015875/F016047
NORCAL MUTUAL INSURANCE COMPANY ET AL.,	SUPER.CT.NO.405369-0
Defendants and Respondents.	
DORIS HELLER, Petitioner,	
v.	
THE SUPERIOR COURT OF FRESNO COUNTY,	
Respondent;	
NORCAL MUTUAL INSURANCE COMPANY et al.,	
Real Parties in Interest.	

PRIOR HISTORY: Superior Court of Fresno County, No. 405369-0, Gary Ray Kerkorian, Judge.

COUNSEL:

Roger K. Vehrs, Thornton Davidson, Tritt & Tritt and James F. Tritt for Plaintiff and Appellant and for Petitoner.

Diehl, Steinheimer, Riggio, Haydel & Mordaunt, M. Max Steinheimer, Bryan D. Smith, Joseph H. Fagundes, Anderson, Galloway & Lucchese, G. Patrick Galloway, Karen A. Sparks, Diepenbrock, Wulff, Plant & Hannigan, Dennis M. Campos, Sean O. Sheridan and John R. Haluck for Defendants and Respondents and for Real Parties in Interest.

Horvitz & Levy, David S. Ettinger, Richard L. Hasen, Greines, Martin, Stein & Richland, Timothy T. Coates and Barry M. Wolf as Amici Curiae on behalf of Defendants and Respondents and Real Parties in Interest.

No appearance for Respondent Superior Court. JUDGES: Opinion by Lucas, C. J., with Arabian, Baxter and George, JJ., and Peterson, J., concurring. Separate concurring and dissenting opinions by Mosk and Kennard, JJ.)

OPINION BY: LUCAS, C. J.

OPINION:

In this case we consider whether unauthorized ex parte discussions that occur during the discovery phase of a medical malpractice action between a nonparty treating physician and the defendant physician's malpractice insurer, regarding the litigant patient's medical condition, violate either the Confidentiality of Medical Information Act (Civ. Code, @ 56 et seq.; all statutory references are to this code unless otherwise indicated), or the constitutional right to privacy (Cal. Const., art. I, @ 1).

We granted review to consider whether plaintiff's seventh and eighth causes of action in her fourth amended complaint state claims against defendants Dr. Kent Yamaguchi (plaintiff's treating physician), and Valley Plastic Surgeons Medical Group, Inc. (Yamaguchi's medical services organization, and hereafter VPSMG), for violation of section 56 et seq., based on unauthorized ex parte discussions about plaintiff's medical condition that occurred between Yamaguchi and Norcal Mutual Insurance Company (hereafter Norcal), and other

nonparties, during the discovery phase of a separate malpractice action plaintiff had filed against her original physician, Dr. Geis (Yamaguchi's associate). n1 Plaintiff filed the present action (to which Geis is not a party) after settling her lawsuit against Geis for $400,000. n2

We must also determine whether these same ex parte discussions support plaintiff's 12th cause of action against Yamaguchi and Norcal (Yamaguchi and Geis's malpractice insurer) for violation of plaintiff's constitutional right to privacy under article I, section 1 of the California Constitution.

As we explain, we conclude that because the purpose of the ex parte discussions was to assist Norcal in defending the malpractice action against Geis, Yamaguchi (and VPSMG) are exempt from liability under section 56.10, subdivision (c)(4) (hereafter, section 56.10(c)(4)), which allows health care providers and insurers to conduct ex parte discussions to facilitate preparation of a defense to a malpractice action. We also conclude that our recent decision in Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1 [26 Cal.Rptr.2d 834, 865 P.2d 633] (hereafter, Hill) is dispositive in precluding plaintiff's 12th cause of action against Yamaguchi and Norcal for invasion of privacy. Plaintiff has failed to meet her initial burden under Hill of establishing that she had a reasonable expectation

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n1 As the complaint indicated, plaintiff does not claim Norcal violated the act by discussing her medical history with Yamaguchi. Indeed, plaintiff is barred from making such a claim because insurers are exempted from the act. Plaintiff's briefs are silent on the issue, but we note that insurers, once covered by section 56, were removed from its application in 1980 following the enactment, also in 1980, of Insurance Code section 791 et seq., which created the Insurance Information and Privacy Protection Act. This act limits "the disclosure of information collected in connection with insurance transactions . . . [and] enable[s] insurance applicants and policy holders to obtain the reasons for any adverse underwriting decision." (Ins. Code, @ 791, added by Stats. 1980, ch. 1214, @ 1, p. 4103; id., @ 791.01, subd. (f) [exempting insurers from @ 56 et seq.].)

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n2 According to Yamaguchi's deposition testimony, both he and Geis, as members of the Central California Faculty Medical Group, provide services to Sierra Hospital on an independent contractor basis.

of privacy in the information that was disclosed during the discovery phase of her malpractice action. (See Hill, supra, 7 Cal.4th at pp. 36-37.) Accordingly, we reverse the Court of Appeal judgment to the extent it concludes plaintiff has stated a cause of action under these facts.

FACTS

Our review arises out of the trial court's sustaining of defendants' demurrers to plaintiff's fourth amended complaint without leave to amend, and the Court of Appeal's reversal, in part, of the trial court judgment. We presume the facts recited in plaintiff's complaint are true and correct. (See Blank v. Kirwan (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].)

In 1987, plaintiff was admitted to Sierra Hospital for removal of a bone spur from her left hand. Shortly after the surgery, she developed a postoperative staphylococcal infection, diagnosed and treated by Geis. As a direct result of the infection, plaintiff's third finger on her left hand had to be amputated in two separate surgeries. Both surgeries were performed by Geis, with Yamaguchi assisting. Thereafter, plaintiff dismissed Geis as her treating physician, believing his treatment of her was negligent. Yamaguchi continued to treat plaintiff for symptoms relating to the infection following the second operation. In 1988, plaintiff sued Geis for medical malpractice. Although Yamaguchi was not a party to the action, he agreed to appear as an expert defense witness on behalf of Geis.

During the discovery phase of the lawsuit, plaintiff deposed Yamaguchi, who revealed that Norcal conducted several private interviews with him (while he was still treating plaintiff), during which he discussed plaintiff's condition and prognosis and disclosed plaintiff's medical records. According to plaintiff, Yamaguchi also agreed with Norcal to testify falsely that the treatment provided to plaintiff by Geis was within the professional standard of care. Plaintiff claimed that Yamaguchi and Norcal attempted to coerce her into settling her case against Geis for significantly less than her eventual settlement of $400,000.

After settling her action against Geis, she brought the present action, claiming the disclosure of her medical information violated section 56 et seq., and her constitutional right to privacy. The trial court sustained defendants' demurrers without leave to amend against all but the negligence cause of action against Yamaguchi (which was not the subject of a demurrer), on the ground that defendants' conduct was immunized by the litigation privilege of section 47, subdivision (b) (hereafter section 47(b)), which immunizes from liability all communications that occur during the course of judicial or quasi-judicial proceedings. (See Rubin v. Green (1993) 4 Cal.4th 1187, 1196 [17 Cal.Rptr.2d 828, 847 P.2d 1044] [hereafter, Rubin] [acts related to litigation and essentially communicative, as opposed to conduct, are privileged under section 47(b)]; Kimmel v. Goland (1990) 51 Cal.3d 202, 211 [271 Cal.Rptr. 191, 793 P.2d 524] [distinguishing between injury arising from communicative acts immunized under section 47(b) and injury arising from noncommunicative conduct unprotected by litigation privilege].)

Plaintiff appealed from the judgments of dismissal. In addition, plaintiff sought a writ of mandate compelling the trial court to set aside its order sustaining the demurrers of Yamaguchi without leave to amend. The Court of Appeal consolidated the appeal with the mandamus action and ultimately reversed the portion of the trial court judgment to the extent that it sustained the demurrers to the seventh and eighth causes of action against Yamaguchi and VPSMG, and the ninth cause of action against Dr. Boro (an associate of Yamaguchi and Geis, and against whom the lawsuit was dismissed after the Court of Appeal judgment became final), for wrongful disclosure of confidential medical information in violation of the act. The court also reversed the trial court's dismissal of the 12th cause of action against Norcal and Yamaguchi for breach of plaintiff's state constitutional right to privacy. The court affirmed the judgment of dismissal in favor of defendant Central California Faculty Medical Group.

In reversing the trial court judgment in part, the Court of Appeal observed that although the medical information obtained by Norcal from Yamaguchi may have been legally discoverable during the course

of the Geis litigation, the method used to discover the information (i.e., private conversations that took place before the issuance of subpoenas and notice of depositions), violated section 56 et seq. and plaintiff's constitutional right to privacy. In so holding, the court rejected as irrelevant defendants' claims that section 56.10(c)(4) renders inapplicable the prohibition of disclosure in section 56.10.

The court also rejected defendants' claim that the actions were barred by the litigation privilege of section 47(b), which immunizes from liability publications or broadcasts made: In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law "to achieve the objects of the litigation . . . [and] that have some connection . . . to the action." (Silberg v. Anderson (1990) 50 Cal.3d 205, 212 [266 Cal.Rptr. 638, 786 P.2d 365] [hereafter, Silberg].) The court concluded that the litigation privilege did not bar recovery of damages because plaintiff based her claims on defendant's conduct rather than on publication or disclosure of the information which, the court conceded, would have been barred by section 47(b). (See Rubin, supra, 4 Cal.4th at p. 1187.)

Defendants Yamaguchi and VPSMG challenge the Court of Appeal's reversal of the trial court's dismissal of the seventh and eighth causes of action for violation of section 56 et seq., and Yamaguchi and Norcal challenge the Court of Appeal's reversal of the order dismissing the twelfth cause of action for violation of plaintiff's constitutional right to privacy. The California Medical Association, the California Association of Hospitals and Health Systems, California Dental Association and the County of Los Angeles and the Regents of the University of California have filed amicus curiae briefs on behalf of defendants.

DISCUSSION

1. SECTION 56 ET SEQ.

Section 56 was originally enacted in 1979 "to provide for the confidentiality of individually identifiable medical information, while permitting certain reasonable and limited uses of that information."

(Stats. 1979, ch. 773, @ 1, p. 2645.) The original act caused several interpretative problems and was described in a legislative analysis as "Organizationally . . . a singular horror, cluttered with superfluous and ambiguous provisions." (Sen. Com. on Judiciary, Background Information to Sen. Bill No. 889.) In 1981, the act was repealed and reenacted (Stats. 1981, ch. 782, @ 1.5, 2, p. 3040).

As reenacted, section 56.10, subdivision (a) provides that: "No provider of health care shall disclose medical information regarding a patient of the provider without first obtaining an authorization, except as provided in subdivision (b) or (c)." Section 56.20 requires health care providers to establish procedures to ensure the confidentiality of patient medical information, and section 56.26, subdivision (a), prohibits third party administrators of health plans from disclosing medical information processed in connection with performing administrative services. Considered together, the statutory provisions require a health care provider to hold confidential a patient's medical information unless the information falls under one of several exceptions to the act.

Sections 56.35 and 56.36 provide remedies for violations of the act, including compensatory damages, punitive damages not to exceed $3,000, attorney fees not to exceed $1,000, and costs of suit. Section 56.36 makes a violation a misdemeanor if the patient suffers economic loss or personal injury.

Thus, in order to violate the act, a provider of health care must make an unauthorized, unexcused disclosure of privileged medical information. A provider is relieved from liability under the act if it can show that the disclosure is excepted either by the mandatory (@ 56.10, subd. (b)) or permissive (@ 56.10(c)(4)) provisions of the act, allowing disclosure of medical information under specified circumstances.

Plaintiff claims that by disclosing her medical information to Norcal without her authorization, defendants violated the act. We agree with defendants and amicus curiae, however, that defendants' ex parte contact with Norcal was contemplated by the permissive exception to

the act under section 56.10(c)(4).

Section 56.10(c)(4) provides that a health care provider may disclose medical information to "persons or organizations insuring, responsible for, or defending professional liability which a provider may incur, if the . . . organizations, or persons are engaged in reviewing the competence . . . of health care professionals or in reviewing health care services with respect to medical necessity, level of care, quality of care, or justification of charges." (@ 56.10(c)(4).) This exception to the provisions of section 56.10 allows a provider of health care to disclose medical information without patient authorization "to persons or organizations which insure or are responsible for defending professional liability." Under our canons of construction, we look to the language of the statute itself to determine if the ordinary meaning is unambiguous; if so, the statutory language controls, and there is no need to look to legislative intent for construction or interpretation. (Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].)

The plain meaning of section 56.10(c)(4) is clear: Yamaguchi, as a health care "provider," and Norcal, as an organization "responsible for defending professional liability," were specifically exempted from the act in one of two ways. First, as an associate of Geis, and plaintiff's treating physician, Yamaguchi was certainly at risk of medical malpractice exposure. Indeed, that risk became a reality when plaintiff filed the present action against Yamaguchi and included a cause of action for professional negligence, which is still viable and not at issue in this appeal. Accordingly, as a potential litigant in a malpractice action and a provider who "may incur" malpractice liability, Yamaguchi was permitted to discuss with Norcal plaintiff's medical condition under section 56.10(c)(4).

Justice Mosk's concurring and dissenting opinion assumes section 56.10 (c)(4) describes only to whom confidential medical information may be disclosed, without allowing such disclosure by "the doctor who possesses the records." (Conc. and dis. opn. of Mosk, J., post, p. 49.) This description of the statutory exception is misleading, for it fails to acknowledge that section 56.10 (c)(4) must be read in

conjunction with section 56.10, subdivision (a), which makes it clear that the former exception applies to medical providers. As noted above, section 56.10, subdivision (a), specifically states that "no provider of health care shall disclose medical information . . . except as provided in subdivision (b) or (c)." (Italics added.) By stating that the statute as a whole applies to medical providers, the Legislature has also made it clear that it is the medical provider alone who may invoke the statutory exceptions. Thus, the concurring and dissenting opinion fails to read the applicable statutory language in pari materia and ignores the fundamental canon of statutory interpretation to "give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose." (Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1159 [278 Cal.Rptr. 614, 805 P.2d 873].)

Other provisions of the act support our interpretation. Section 56.105 provides that any demand for settlement or compromise of a medical malpractice claim made by a potential plaintiff "prior to the service of a complaint upon a defendant," must be accompanied by an authorization to disclose medical information "to persons or organizations insuring, responsible for, or defending professional liability" regarding that claim. (@ 56.105.) Looking to legislative history for an analysis of the effect of section 56.105 on section 56.10(c)(4), we find that section 56.105 supports our interpretation of the exception.

The Legislative Counsel's Digest describes section 56.105 as follows: "Existing law prohibits the release or disclosure of medical information about a patient without an authorization except in specified circumstances, including disclosure to persons insuring, responsible for, or defending professional liability.

"This bill would provide that whenever, prior to service of a complaint in an action arising out of the professional negligence of a physician, a demand for settlement or offer of compromise is made, the demand or offer shall be accompanied by an authorization to disclose medical information to persons or organizations insuring, responsible for, or defending professional liability." (Legis. Counsel's Dig., Sen. Bill No. 1229 (1985-1986 Reg. Sess.).)

Thus, legislative history demonstrates that prior to the enactment of section 56.105, the Legislature contemplated that a health care provider could lawfully disclose a patient's medical information to "persons or organizations insuring, responsible for, or defending professional liability" when those persons or organizations were evaluating or defending potential malpractice claims. Section 56.105 was therefore enacted to further protect defendants from any claim that disclosure of medical information in the context of preparing a defense to a potential malpractice claim violated the Confidentiality of Medical Information Act.

Finally, section 56.16 supports defendants' view of permissive disclosure under section 56.10(c)(4). That section provides: "Unless there is a specific written request by the patient to the contrary, nothing in this part shall be construed to prevent a provider, upon an inquiry concerning a specific patient, from releasing at its discretion any of the following information: the patient's name, address, age, and sex; a general description of the reason for treatment (whether an injury, a burn, poisoning, or some unrelated condition); the general nature of the injury, burn, poisoning, or other condition; the general condition of the patient; and any information that is not medical information as defined in subdivision (c) of Section 56.05." (@ 56.16.)

As the above provisions show, section 56 et seq. contemplates release of medical information either to enable a potential defendant to prepare a defense to a medical malpractice claim or to facilitate resolution of a claim prior to filing of a lawsuit. Read together, the permissive and mandatory exceptions to section 56 et seq. enable parties to conduct time-saving and cost-efficient investigation and settlement of patient claims.

Plaintiff asserts that the common law prohibits ex parte contacts between physicians and their insurers and allows communication during "formal discovery" proceedings only in order to protect physician-patient confidentiality. Plaintiff relies on Torres v. Superior Court (1990) 221 Cal. App. 3d 181, 187 [270 Cal.Rptr. 401] (hereafter, Torres) to support her position. (Accord, Province v. Center for Women's Health & Family Birth (1993) 20 Cal.App.4th 1673, 1684-

1687 [25 Cal.Rptr.2d 667] [hereafter, Province].)

The Torres court was asked to determine whether a nonparty physician who treated a malpractice claimant may testify as an expert for the defense on the standard of care employed by subsequent treating physicians. Although the plaintiff had conceded a "limited waiver" of his statutory physician-patient privilege as defined in Evidence Code section 994, he contended that the doctor owed him a "fiduciary duty to refuse affirmative assistance to [his adversary] in litigation respecting his physical condition." (Torres, supra, 221 Cal. App. 3d at p.184; accord, Province, supra, 20 Cal.App.4th at p. 1684.)

The Torres court held that the physician could testify subject to a protective order prohibiting ex parte interviews between defendant's counsel and the physician-expert witness to ensure plaintiff's physician-patient relationship would remain protected. (Torres, supra, 221 Cal. App. 3d at p. 188.) Plaintiff asserts that Torres essentially prohibits all ex parte communication between a physician and his patient's adversaries in litigation.

Torres is inapposite. The Confidentiality of Medical Information Act was not an issue in the case. Dr. Yamaguchi never testified, and plaintiff never challenged his ability to do so. Nonetheless, to the extent Torres and Province could be read to prohibit all ex parte contacts between a physician and his attorneys or insurers, in conflict with this opinion, those cases are disapproved.

On the basis of the foregoing analysis, we conclude that defendants did not violate section 56 et seq. by discussing plaintiff's medical condition with their insurer Norcal. The statute is clear that the discussions between Yamaguchi and Norcal were excepted from liability, and plaintiff has failed to convince us that we should disturb the statutory scheme. Should the Legislature deem it necessary to further limit access to a plaintiff's medical condition, it is free to do so by amendment. Our conclusion obviates the need to discuss application of the litigation privilege of section 47(b) to plaintiff's claim of violation of section 56 et seq.

2. CONSTITUTIONAL RIGHT OF PRIVACY

Plaintiff's 12th cause of action names as defendants Yamaguchi and Norcal only, and alleges that Yamaguchi secretly disclosed confidential information to Norcal and its agents and employees in violation of plaintiff's constitutional right to privacy under article I, section 1 of the California Constitution. The Court of Appeal reversed the trial court's dismissal of plaintiff's privacy action, relying on Urbaniak v. Newton (1990) 226 Cal. App. 3d 1128 [277 Cal.Rptr. 354], which held that an alleged unauthorized disclosure of the plaintiff's HIV status (leading to the denial of worker's compensation benefits) gave rise to an action for a violation plaintiff's constitutional right to privacy. This right, the Court of Appeal determined, cannot be defeated by the litigation immunity conferred by section 47(b) because a statute cannot immunize from liability conduct made actionable by the California Constitution. (See Urbaniak, supra, 226 Cal. App. 3d at p. 1138; see also Rancho La Costa, Inc. v. Superior Court (1980) 106 Cal. App. 3d 646, 667 [165 Cal.Rptr. 347] [judicial privilege cannot defeat claim of federal privacy interest].)

Although the Urbaniak decision may have been correct in its discussion of the right to privacy in the context of unauthorized disclosure of a patient's HIV status, we view the present plaintiff's privacy claims in a different light. Specifically, this claim must be analyzed under our recent decision in Hill, supra, 7 Cal.4th 1. n3

In Hill, supra, we held that "a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (Hill, supra, 7 Cal.4th at pp. 39-40.)

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n3 We do not remand the case to allow plaintiff to replead her cause of action for invasion of privacy in light of Hill because plaintiff filed her answer brief on February 22, 1994, after we had filed Hill. Indeed, plaintiff recognizes that "Hill is controlling and prescribes the method in this state for balancing countervailing interests."

We also noted in Hill, however, that "[a] defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. Plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct having a lesser impact on privacy interests." (7 Cal.4th at p. 40.) We held that "in cases where material facts are undisputed, adjudication as a matter of law may be appropriate." (Ibid.)

We conclude that, as a matter of law, plaintiff has failed to state a cause of action for invasion of her state constitutional privacy interest. This conclusion is based on the fact that plaintiff did not adequately plead facts supporting a conclusion that any expectation of privacy as to her medical condition would be reasonable under the circumstances of this case. Thus, plaintiff has failed to establish the second essential element of a state constitutional cause of action for invasion of privacy. n4

In Hill, we held that the extent of a privacy interest is dependent on the circumstances. We emphasized that "[e]ven when a legally cognizable privacy interest is present, other factors may affect a person's reasonable expectation of privacy. For example, advance notice of an impending action may serve to ' "limit [an] intrusion upon personal dignity and security that would otherwise be regarded as serious." ' " (7 Cal.4th at p. 36.)

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n4 Plaintiff's allegations concerning Yamaguchi's disclosure to Norcal of her financial and emotional state do not fall within the protection of either section 56 et seq. of the constitional right to privacy, for the information is unrelated to her medical condition. (@ 56.05,sybd, (b) [section 56 et sep. applies to disclosure of "medical information" only]; see Kizer v. Sulnick (1988) 202 Cal. App. 3d 431, 439 [248 Cal Rptr. 712] [if communication not made to obtain diagnosis, pursuit of claim for damages is inconsistant with reasonable expectation of privacy matters related to medical condition.

By placing her physical condition in issue in the Geis litigation, plaintiff's expectation of privacy regarding that condition was substantially lowered by the very nature of the action. As we stated in Hill, supra, 7 Cal.4th at page 37, a " 'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. (See e.g., Rest.2d Torts, [ ] @ 652D, com. (c) ['The protection afforded to the plaintiff's interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens.'].)" Hence, even assuming arguendo that a breach of section 56.10 duties occurred, the information that Norcal discovered in the conversations between Dr. Yamaguchi and Norcal would have been inevitably discovered during the course of the Geis litigation because Dr. Yamaguchi was scheduled as an expert witness for the defense. n5 Any expectation on plaintiff's part that such information would remain confidential was thus unreasonable.

Finally, as we observed in Hill, supra, 7 Cal.4th at page 37, when determining the existence (or not) of a constitutionally protected claim, we must weigh the severity of each potential invasion of privacy: "No community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of

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n5 By filing a medical malpractice action against Dr. Geis, plaintiff was certainly aware that her medical condition would be an issue. Defendants now claim that this awareness, by itself, constituted a waiver of the doctor-patient privilege under Evidence Code section 996 and rendered section 56.10 inapplicable. We reject this contention. Under Evidence Code section 996, subdivision (a), the physician-patient relationship is waived "as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by: [P] (a) The patient." The allegations in the present action are based on communications made in the first lawsuit against Geis. By suing Geis for malpractice, plaintiff may have waived any doctor-patient confidentiality surrounding Geis's treatment of her hand, but she did not, in that lawsuit, waive the doctor-patient privilege as to confidential information she relayed to defendant Yamaguchi. For these same reasons, we decline Norcal's request to judicially notice various discovery documents from the Geis litigation (including a subpoena duces tecum directed at discovering Yamaguchi's business records), because the documents are unnecessary to our discussion of plaintiff's state constitutional right to privacy. (Evid. Code, @ 452, subd. (d).)

action for invasion of privacy. . .. Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy."

The discussions between Yamaguchi and Norcal could not be considered sufficiently serious in their scope or impact to give rise to an actionable invasion of privacy. (Hill, supra, 7 Cal.4th at p. 37.) Because the information would most likely have been discovered during the ordinary course of litigation, defendants' conduct in revealing information about plaintiff's treatment and physical condition does not violate the state constitutional guarantee against invasion of privacy as a matter of law. Accordingly, we need not reach plaintiff's claim that a constitutional invasion of privacy defeats application of the litigation privilege.

3. PLAINTIFF'S REMAINING CLAIMS

Plaintiff asserts the Court of Appeal erred in upholding the trial court judgment sustaining defendants' demurrers to the second through sixth, and eleventh causes of action. As the Court of Appeal observed, these causes of action are all grounded on common law torts—negligent and intentional infliction of emotional distress, interference with the physician-patient relationship, and concealment. Plaintiff claims she suffered injury because, in her litigation against Geis, defendants used information they had wrongfully obtained. The Court of Appeal held that the litigation privilege of section 47(b) prevents recovery on these causes of action.

We agree with the Court of Appeal. We have consistently held that communications occurring during the course of litigation are absolutely privileged under section 47(b) and cases interpreting the statute. (Rubin, supra, 4 Cal. 4th at p. 1194.) The policy behind the privilege, "to afford litigants and witnesses . . . the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions" is equally applicable to the tort causes of action

in the present litigation. (Silberg, supra, 50 Cal.3d at p. 213, citation omitted.)

Finally, plaintiff asserts that the Court of Appeal erroneously affirmed the trial court's judgment sustaining defendants' demurrer to the 10th cause of action against Yamaguchi, VPSMG, and Norcal for conspiring to commit unfair business practices in violation of Business and Professions Code section 17200 et seq. As the Court of Appeal correctly noted, damages are not available for claims under the Unfair Business Practices Act. (Bank of the West v. Superior Court (1992) 2 Cal.4th 1254, 1266 [10 Cal.Rptr.2d 538, 833 P.2d 545].)

CONCLUSION

We conclude that plaintiff has failed to state a cause of action for violation of section 56 et seq. because defendants are exempted under the act by section 56.10(c)(4). In addition, we conclude that plaintiff has failed to state a cause of action for violation of the constitutional right to privacy under article I, section 1 of the state Constitution. (Hill, supra, 7 Cal.4th at pp. 35-39.) Plaintiff does not plead that she has either a legally protected privacy interest, or a reasonable expectation of privacy, in information that would eventually have been discovered in litigation. Moreover, in our view, plaintiff has not alleged a sufficiently serious invasion of her privacy interest to warrant actionable relief under the privacy clause of our state Constitution. (7 Cal.4th at pp. 53-54.) The Court of Appeal's judgment as to the seventh, eighth, and twelfth causes of action is reversed. In all other respects, the judgment is affirmed.

Arabian, J., Baxter, J., George, J., and Peterson, J., n* concurred.

CONCURBY: MOSK, J., [In Part]; KENNARD, J., [In Part]

DISSENTBY: MOSK, J., [In Part]; KENNARD, J., [In Part]

DISSENT:

MOSK, J. Concurring and Dissenting.—

I

The majority assert that the Confidentiality of Medical Information Act (Civ. Code, @ 56 et seq.; hereafter the Act) n1 permits a doctor to disclose a patient's medical records, without any authorization from the patient, to a malpractice insurer if the doctor fears he or she "may incur" malpractice liability. I am not persuaded.

The purpose of the Act is to provide reasonable protection for the confidentiality of patient's medical records. (Stats. 1981, ch. 782, @ 1, p. 3040.) "It is the intention of the Legislature in enacting this act, to provide for the confidentiality of individually identifiable medical information, while permitting certain reasonable and limited uses of that information." (Ibid.)

The basic scheme of the Act is that a medical provider must not disclose medical information without a written authorization from the patient. There are exceptions. Thus, section 56.10 provides that "[n]o provider of health care shall disclose medical information regarding a patient of the provider without first obtaining an authorization, except as provided in subdivision (b) or (c)."

Before I examine the exceptions, it is important to consider what sort of authorization the Legislature requires pursuant to its basic rule. The Legislature has been quite demanding. An authorization is valid if it is handwritten or typed in legible type on a separate piece of paper and is properly signed and dated by the patient or enumerated

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n1 All statutory references are to the Civil Code unless otherwise indicated.

substitutes. (@ 56.11, subds. (a), (b) & (c).) The authorization must state ". . . the specific uses and limitations on the types of medical information to be disclosed . . . [,] [P] . . . the name or functions of the provider of health care that may disclose the medical information . . . [,] [P] . . . the name or functions of the persons or entities authorized to receive the medical information . . . [,] [P] . . . the specific uses and limitations on the use of the medical information by the persons or entities authorized to receive the medical information . . . [,] [P] . . . a specific date after which the provider of health care is no longer authorized to disclose the medical information" and that the person signing the authorization has been advised of the right to receive a copy of the authorization. (@ 56.11, subds. (d)-(i).)

These provisions demonstrate an interest in assuring that medical information be disclosed only for a narrowly defined purpose, to an identified party, for a limited period of time.

The authorization is not a mere formality that may be overlooked, but is, under normal circumstances, a sine qua non. We can see this because sometimes the patient is required to provide an authorization. (@ 56.105.) In a section that is highly relevant to this case, the Legislature has required the patient to supply an authorization when, prior to filing a complaint, he or she serves a demand letter or offer of compromise in a claim for professional negligence. (Ibid.) The section covers the problem of informal discovery (formal discovery is treated in @ 56.10, subd. (b)), and specifies that "[t]he authorization shall be in accordance with Section 56.11 and shall authorize disclosure of that information that is necessary to investigate issues of liability and extent of potential damages in evaluating the merits of the demand for settlement or offer to compromise." (@ 56.105.)

The disclosure in this case was not made pursuant to any authorization, nor does there appear any claim that plaintiff should have provided an authorization under section 56.105.

The question remains whether any of the statutory exceptions to the authorization requirement apply.

The Act provides that disclosure is required even in the absence of an authorization when compelled by court order, subpoena, or search warrant or "otherwise specifically required by law." (@ 56.10, subd. (b)(1)-(b)(7).) It is undisputed that these provisions do not apply here.

The Act also provides that disclosure is permissible without an authorization in several types of situations. Disclosure is permissible to other health care providers "for purposes of diagnosis or treatment of the patient." (@ 56.10, subd. (c)(1).) Disclosure is permissible to an entity responsible for paying a medical bill (and to billing services) "to the extent necessary to allow responsibility for payment to be determined and payment to be made." (@ 56.10, subd. (c)(2), (c)(3).)

Disclosure is permissible to groups performing peer review "or to persons or organizations insuring, responsible for, or defending professional liability which a provider may incur," if the groups or persons "are engaged in reviewing the competence or qualifications of health care professionals or in reviewing health care services with respect to medical necessity, level of care, quality of care, or justification of charges." (@ 56.10, subd. (c)(4).)

Disclosure is also permissible for the purpose of licensing or accrediting a provider of health care (@ 56.10, subd. (c)(5)); for the purpose of a coroner's investigation (@ 56.10, subd. (c)(6)); for bona fide medical research (@ 56.10, subd. (c)(7)); for certain employment-related claims relevant to an employee's lawsuit against an employer (@ 56.10, subd. (c)(8)); in connection with certain coverage claims (@ 56.10, subd. (c)(9)); to a group practice plan for the purpose of administering the group practice plan (@ 56.10, subd. (c)(10)); to insurance agents in compliance with certain Insurance Code provisions (@ 56.10, subd. (c)(11)); to a probate court investigator under specified circumstances (@ 56.10, subd. (c)(12)); to a tissue bank under specified circumstances (@ 56.10, subd. (c)(13)), and when the disclosure "is otherwise specifically authorized by law." (@ 56.10, subd. (c)(14).)

The majority hold that the exception described in section 56.10, subdivision (c)(4) covers the circumstances of this case. I disagree. The majority fail to examine the entire subdivision and to read the applicable language in pari materia.

Section 56.10, subdivision (c)(4) permits disclosure "to organized committees and agents of professional societies or of medical staffs of licensed hospitals, or to licensed health care service plans, or to professional standards review organizations, or to utilization and quality control peer review organizations as established by Congress in Public Law 97-248 in 1982, or to persons or organizations insuring, responsible for, or defending professional liability which a provider may incur, if the committees, agents, plans, organizations, or persons are engaged in reviewing the competence or qualifications of health care professionals or in reviewing health care services with respect to medical necessity, level of care, quality of care, or justification of charges."

The majority assert that because Dr. Yamaguchi was in danger of medical malpractice exposure as the associate of a doctor whom his patient was already suing, Dr. Yamaguchi came under section 56.10, subdivision (c)(4) as a provider who "may incur" malpractice liability. (Maj. opn., ante, p. 39.)

The interpretation is ungrammatical. The term "professional liability which a provider may incur" is part of an entire adjectival clause that modifies the term "persons or organizations." (@ 56.10, subd. (c)(4).) The clause describes persons or organizations to whom information may be disclosed, not, as the majority suggest, persons who may disclose information.

The phrase specifies that the persons or organizations to whom medical information may be disclosed must be those that are insuring or are responsible for or are defending malpractice liability. It does not describe under what circumstances the disclosure may be made, but merely describes the recipient. The language describing under what circumstances the disclosure may be made comes later in the paragraph, starting with the word "if."

Thus the phrase upon which the majority rely does not mean that a doctor who is afraid he or she—or an employee—"may incur" malpractice liability may disclose patient's records to the insurer. Nor does it mean that a doctor would be a "person defending professional

liability," because throughout the Act, doctors are referred to as "providers." And, as I have noted, the section describes persons and organizations to whom information may be disclosed. This description does not refer to the doctor who possesses the records. In any case, there is certainly no evidence that Dr. Yamaguchi was defending his professional liability when he made the disclosures—nor am I aware of any evidence in the record before us establishing that Dr. Yamaguchi actually "might incur" malpractice liability at the time he made the disclosure.

The majority also claim that the term "quality of care" includes the question of malpractice liability, so that an insurer defending a malpractice claim would be a proper recipient of disclosure under section 56.10, subdivision (c)(4). (Maj. opn., ante, p. 39.)

Such an interpretation is inconsistent with the general purpose of the Act to restrict disclosure of medical records except as specifically provided by the Act, and renders the particular provision of the Act regarding informal discovery in malpractice actions meaningless surplusage. It is also inconsistent with the general purpose of the subdivision. Finally, it would interpret the phrase "quality of care" as referring to malpractice liability, though a different term has been used in the statute that applies specifically to malpractice actions.

We should not interpret isolated phrases in section 56.10, subdivision (c)(4), but should interpret the whole paragraph in order to ascertain and carry out the Legislature's intent. It is a principle of statutory construction that the meaning of a word may be determined by reference to other terms that are associated with it in the same statute. (People v. Rogers (1971) 5 Cal.3d 129, 142 [95 Cal.Rptr. 601, 486 P.2d 129] (conc. and dis. opn. of Mosk, J.) [discussing doctrine of noscitur a sociis].) "[W]hen a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope. . .. In accordance with this principle of construction, a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning . . . would otherwise make the item markedly dissimilar to the other items in the

list." (Moore v. California State Bd. of Accountancy (1992) 2 Cal.4th 999, 1011-1012 [9 Cal.Rptr.2d 358, 831 P.2d 798].) The majority opinion fails to follow this directive, instead choosing to interpret isolated phrases without reference to the whole.

Section 56.10, subdivision (c)(4) should be interpreted so that the term "quality of care" means something similar for each entity described by the paragraph. What each entity has in common is its function in reviewing quality of care for the purpose of determining whether the physician is good enough to receive the imprimatur of the group requesting the information, whether it be for peer recognition or rating services, extending group practice or hospital staff privileges or providing insurance coverage. An insurer deciding whether to offer or continue malpractice insurance to a provider stands in need of patient records for substantially the same reason as the various other entities enumerated in the paragraph. I would conclude that the statute should be interpreted to permit providers to disclose patient information to insurers without any patient authorization only for such a purpose.

My interpretation is supported by legislative history. When this subdivision was first enacted, it was labeled "For peer review of physicians." (Former @ 56.15, subd. (c)(2)(A); Stats. 1979, ch. 773, @ 1, p. 2648.) The subdivision permitted disclosure to "organized committees of professional societies, including components or subsidiaries thereof, or of medical staffs of licensed hospitals, or to professional standards review organizations organized in a manner which makes available professional competence to review professional competence or qualifications or health care services with respect to medical necessity, quality of care, or economic justification of charges or level of care." (Ibid. ., italics added.)

In 1981, the Act was revised, adding section 56.10, subdivision (c)(4) in substantially the same form as it now appears. The new subdivision added the reference to insurers upon which the majority rely, but retained the qualification that the persons or organizations to whom disclosure is made must be engaged in reviewing professional competence or qualifications or in reviewing medical necessity, level of care, quality of care, or justification of charges. (Stats. 1981, ch.

782, @ 1, p. 3042, italics added.)

We should infer that "quality of care" means basically the same term it meant in 1979, that is, that the information is to be disclosed only if the organizations or persons seeking disclosure are engaged in determining whether a provider is adequately qualified to receive the organization or person's approval, membership or services.

Defending a malpractice action does not meet this qualification. In such circumstances, the issues are liability and damages, not competence or qualification. When the Legislature has wished to describe the function of a malpractice carrier in defending a claim for malpractice, it has described that function in quite different terms than are used in section 56.10, subdivision (c)(4). Thus, section 56.105 requires the patient to authorize disclosure of "that information that is necessary to investigate issues of liability and extent of potential damages." (Italics added.)

We must read sections 56.105 and 56.10, subdivision (c)(4) in pari materia. They are part of the same act and should be harmonized to carry out the intent of the Legislature and give effect to both provisions. (City of Huntington Beach v. Board of Administration (1992) 4 Cal.4th 462, 468 [14 Cal.Rptr.2d 514, 841 P.2d 1034]; Dyna-Med v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1387 [241 Cal.Rptr. 67, 743 P.2d 1323].) An interpretation of section 56.10, subdivision (c)(4) that permits a doctor to disclose medical information because a malpractice insurer is investigating a malpractice claim would make section 56.105 meaningless, and would fail to give it any effect.

I cannot understand the majority's claim that section 56.105 supports its interpretation. (Maj. opn., ante, p. 40.) Section 56.105 was enacted after section 56.10, subdivision (c)(4). The Legislature, when it enacted section 56.105, thought it necessary to provide for precomplaint disclosure of medical information in malpractice actions. It would not have done so had it considered that section 56.10, subdivision (c)(4) already permitted such disclosure. The Legislative Counsel's Digest upon which the majority rely for a contrary conclusion

does not define the nature of the disclosure that could be made to malpractice insurers under existing law, and in any event, the Legislature's own action is far more probative of its intent than a broad, general statement of the Legislative Counsel. n2

The majority claim that its interpretation is necessary to serve the goal of reasonable, informal pretrial discovery in order to promote settlement. But this goal is already served by section 56.105. Nor should we overlook the fact that formal discovery itself is intended to promote settlement. (See, e.g., Province v. Center for Women's Health & Family Birth (1993) 20 Cal.App.4th 1673, 1683-1684 [25 Cal.Rptr.2d 667].) Unlimited ex parte disclosure on the part of any doctor who fears he or she "may incur" malpractice liability is unnecessary and inconsistent with the purpose of the Act.

II

Although I would find that the disclosure plaintiff complains of was not permitted by the Act, nonetheless I would hold that the litigation privilege of section 47, subdivision (b) (hereafter section 47(b)) immunized Dr. Yamaguchi from liability because his disclosures occurred in connection with the ongoing litigation against Dr. Geis.

Section 47(b) immunizes publications "(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (Silberg v. Anderson (1990) 50 Cal.3d 205, 212 [266 Cal.Rptr. 638, 786 P.2d 365].) The privilege is absolute and immunizes persons for liability for all torts. The only exception is in an action for malicious prosecution. (at pp. 215-216.) The privilege also applies to prelitigation communications that have some relation to anticipated lawsuits. (Rubin v. Green (1993) 4 Cal.4th 1187, 1194 [17 Cal.Rptr.2d 828, 847 P.2d 1044].) [*45]

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n2 The majority's reference to section 56.16 is also unpersuasive. Plaintiff's claim that Dr. Yamaguchi disclosed her present and past medical condition goes far beyond the limited disclosure authorized by that section. If the section authorized the disclosure plaintiff complains of, the restrictions of the rest of the Act would be unenforceable.

As it is undisputed that the communication at issue here between Dr. Yamaguchi and the insurer had a clear relationship to the lawsuit against Dr. Geis, it seems clear on the face of the matter that the litigation privilege should apply.

The Court of Appeal found otherwise, concluding that conduct, rather than communication, was at issue.

It is true that in Ribas v. Clark (1985) 38 Cal.3d 355 [212 Cal.Rptr. 143, 696 P.2d 637, 49 A.L.R.4th 417] and Kimmel v. Goland (1990) 51 Cal.3d 202 [271 Cal.Rptr. 191, 793 P.2d 524], we pointed out that when it is noncommunicative conduct, such as eavesdropping or surreptitious taping, rather than communication for the purpose of litigation that causes an injury, the litigation privilege does not apply. In Ribas, supra, 38 Cal.3d 355, an attorney's violation of a statute in taping the conversation between his client and the opposing party caused an injury at the moment it occurred—the injury did not arise from a communication for the purpose of litigation. We concluded that although the taping itself was actionable, the testimonial use of the contents of the overheard conversation was privileged. (, at p. 364; see also Rubin v. Green, supra, 4 Cal.4th at p. 1195.) Similarly, in Kimmel v. Goland, supra, 51 Cal.3d 202, the conduct of secretly taping a telephone conversation caused an actionable injury that was not related to any publication of the information contained in the telephone conversation. (, at p. 209.) We distinguished "injury allegedly arising from communicative acts . . . and injury resulting from noncommunicative conduct, i.e., the invasion of privacy resulting from the attorney's eavesdropping." (, at p. 211.) Thus we carefully distinguished immunized communicative acts related to litigation and injuries arising from illegal conduct unrelated to any judicial proceeding.

We recently made this distinction even more clearly in Rubin v. Green, supra, 4 Cal.4th 1187. There we held that an attorney's solicitation of business in possible violation of the Business and Professions Code was essentially communicative, and therefore privileged under section 47(b). That the defendant's communication necessarily also involved related conduct did not destroy the privilege.

(4 Cal.4th at p. 1195.) We held that "plaintiff's claims, however styled, are founded essentially upon alleged misrepresentations made by the law firm (and Green) to [park residents] in the course of discussions over park conditions and the possibility of being retained to prosecute the failure-to-maintain action, and the subsequent filing of pleadings in the lawsuit itself. Whether these acts amounted to wrongful attorney solicitation or not, they were communicative in their essential nature and therefore within the privilege of section 47(b)." (, at p. 1196.)

Thus the defendant's violation of the Act in this case, like the possible violation of the Business and Professions Code in Rubin v. Green, supra, 4 Cal.4th 1187, does not by itself strip him of the protection of the litigation privilege. The relevant question is not whether defendant violated a statute, but whether defendant injured plaintiff through conduct or through communication.

It cannot be gainsaid that plaintiff alleges in her seventh, eighth and twelfth causes of action that Dr. Yamaguchi injured her because he "disclosed . . . confidential medical information" to Norcal. The general allegations of her complaint allege that Dr. Yamaguchi disclosed the information for the purpose of aiding the defense of the ongoing litigation against Dr. Geis. It follows that her complaint arises from a communication connected with litigation, one that our case law clearly establishes is immunized by section 47(b).

III

Plaintiff has alleged that defendant's disclosure of confidential information about her medical condition was a violation of her constitutional right to privacy under article I, section 1 of the California Constitution. I would conclude that because it was foreseeable that the disclosure was within established limits of the litigation privilege, plaintiff cannot make out a claim for violation of privacy under the majority opinion in Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1 [26 Cal.Rptr.2d 834, 865 P.2d 633] (Hill).

In Hill, supra, 7 Cal.4th 1, we held that "a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (, at pp. 39-40.) Although I disagree with this standard (, at p. 73 et seq. (dis. opn. of Mosk, J.)), it is the law.

A plaintiff who brings a malpractice action has a limited expectation of privacy in his or her medical records. Although I would find the particular disclosure inappropriate under the Act, a plaintiff bringing such an action is required to make substantial disclosures regarding medical history during formal and informal discovery. (@ 56.10, subd. (b), 56.105.) The patient, in fact, may not be able to assert the physician-patient privilege as to matters put in issue by the allegations of the complaint. (Evid. Code, @ 996; see, e.g., People v. Mickle (1991) 54 Cal.3d 140, 189 [284 Cal.Rptr. 511, 814 P.2d 290]; see also In re Lifschutz (1970) 2 Cal.3d 415 [85 Cal.Rptr. 829, 467 P.2d 557, 44 A.L.R.3d 1].) Indeed, a patient's treating physician who, like Dr. Yamaguchi, is not the subject of a lawsuit, may testify on behalf of the defense in a malpractice action against another doctor. (See Torres v. Superior Court (1990) 221 Cal. App. 3d 181, 186-188 [270 Cal.Rptr. 401]; see also Province v. Center for Women's Health & Family Birth, supra, 20 Cal.App.4th 1673, 1685.) Accordingly, plaintiff had a relatively limited privacy interest in information regarding her "current and past medical condition" during treatment for the condition caused by Dr. Geis's negligence.

Finally, defendant's disclosures do not represent the serious invasion of privacy that we said should be actionable in Hill, supra, 7 Cal.4th 1. Rather, defendant's disclosures, though painful as far as plaintiff was concerned, actually may have served another right of constitutional magnitude, that is, the right of free access to the courts. (See Pacific Gas & Electric Co. v. Bear Stearns & Co. (1990) 50 Cal.3d 1118, 1133 [270 Cal.Rptr. 1, 791 P.2d 587].) As we said in Rubin v. Green, supra, 4 Cal.4th 1187, "[u]ndergirding the immunity conferred by section 47(b) is the broadly applicable policy of assuring

litigants 'the utmost freedom of access to the courts to secure and defend their rights . . ..' " (, at p. 1194, italics added.)

Accordingly, I would conclude that plaintiff has failed to make out a claim for violation of the constitutional right to privacy under article I, section 1 of the California Constitution.

IV

I dissent from the conclusion of the majority that plaintiff failed to state a cause of action for violation of section 56 et seq. I concur, however, in the disposition of the majority because I would find the claim barred by the litigation privilege, and I would find no violation of constitutional rights under Hill, supra, 7 Cal.4th 1.

KENNARD, J. - Concurring and Dissenting.—I agree with the majority that a doctor does not violate the Confidentiality of Medical Information Act (Civ. Code, @ 56 et seq.) by releasing a patient's medical information to a lawyer or insurer defending another doctor against whom the patient has asserted a claim for medical malpractice. And I agree with Justice Mosk that when a lawyer or insurer interviews a doctor to gather information for use in defending a claim of medical malpractice, the conduct of all participants in the interview is protected by the litigation privilege (Civ. Code, @ 47, subd. (b)).

But I part company with the majority and with Justice Mosk when it comes to the right of privacy guaranteed by our state Constitution. Although it is true that by asserting a medical malpractice claim a patient relinquishes the right of privacy as to matters directly relevant to the claim and essential to its fair resolution, the patient retains in full the right of privacy as to all confidential information not meeting this strict test of legal relevance. Because the complaint here alleges that plaintiff's doctor revealed matters that are unlikely to have direct relevance to her malpractice claim, and because the litigation privilege does not bar a constitutional right of action, plaintiff should be permitted to go forward with her cause of action for violation of the constitutional right of privacy.

Finally, I do not join the majority to the extent it may appear to give unqualified approval to ex parte interviews n1 of a medical malpractice plaintiff's doctor, without the knowledge or consent of the plaintiff or the plaintiff's counsel. The propriety of this practice has sharply divided this country's appellate courts, and I would leave this matter open for resolution in a proper case.

I. FACTS

Dr. Geis treated plaintiff Doris Heller for an infection in one finger. Despite Geis's treatment, the infection worsened to the point that it became necessary to amputate the finger. Geis and Dr. Yamaguchi performed the amputation, which occurred in two stages. After the amputation, plaintiff developed reflex sympathetic dystrophy, which is characterized by burning pain and swelling. Yamaguchi treated plaintiff for this condition.

While plaintiff was under the care of Dr. Yamaguchi, she commenced suit against Dr. Geis for malpractice in the diagnosis and treatment of the original infection. During the course of this lawsuit, Yamaguchi was deposed and he revealed that a representative of Norcal Mutual Insurance Company (the professional liability insurer of both Geis and Yamaguchi; hereafter Norcal) and the lawyer who was representing Geis had interviewed Yamaguchi on several occasions. Following this revelation, plaintiff settled her action against Geis and commenced this action against Yamaguchi, Norcal, and others.

In the complaint at issue here (plaintiff's fourth amended complaint), plaintiff has alleged that Norcal and Dr. Yamaguchi "conspired and agreed to obtain and release private, intimate, personal, financial, and confidential medical information and records without the consent or knowledge of [plaintiff] or her attorney."

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n1 "Ex parte" has been defined as "On one side only; by or for one party; done for, in behalf of, or on the application of, one party only." (Black's Law Dict. (5th ed. 1979) p. 517.) As used here, an "ex parte interview" is an interview conducted by one party litigant in the absence of other party litigants.

Plaintiff further alleges that this information and these records were "obtained and provided to Norcal in order to obtain an economic advantage over [plaintiff] in her suit against Dr. Geis . . .."

Plaintiff's complaint attempts to state claims for medical negligence (against Yamaguchi), negligent infliction of emotional distress (against Yamaguchi and Norcal), intentional infliction of emotional distress (against Yamaguchi and Norcal), intentional interference with the doctor-patient relationship (against Norcal), violation of the Confidentiality of Medical Information Act (against Yamaguchi), unfair business practices (against Norcal and Yamaguchi), concealment (against Norcal and Yamaguchi), and violation of the constitutional right of privacy (against Norcal and Yamaguchi).

Yamaguchi and Norcal each challenged plaintiff's complaint by demurrer. The trial court sustained Norcal's demurrer without leave to amend as to each of plaintiff's claims against Norcal, and it granted a judgment dismissing Norcal from the action. As for Yamaguchi, the trial court overruled his demurrer to the cause of action for medical negligence, and it sustained without leave to amend Yamaguchi's demurrer to each of the other causes of action. Plaintiff appealed from the judgment of dismissal in favor of Norcal, and she petitioned the Court of Appeal for a writ of mandate to overturn the trial court's ruling barring each of her claims against Yamaguchi except the claim for medical negligence.

The Court of Appeal issued an order to show cause on plaintiff's mandate petition, and it consolidated that proceeding with the appeal from the judgment of dismissal in favor of Norcal. In its opinion in these consolidated proceedings, the Court of Appeal held that the litigation privilege (Civ. Code, @ 47, subd. (b)) operated to bar plaintiff's claims against Norcal and Yamaguchi for negligent and intentional infliction of emotional distress, interference with the doctor-patient relationship, unfair business practices, and concealment. The Court of Appeal concluded that the litigation privilege did not apply to plaintiff's claims for violation of the Confidentiality of Medical Information Act and violation of the constitutional right of privacy,

and that the pleading of these claims was adequate to withstand demurrer. This court granted petitions for review by Norcal and Yamaguchi.

II. THE CONFIDENTIALITY OF MEDICAL INFORMATION ACT

In simple language, the Confidentiality of Medical Information Act (Civ. Code, @ 56 et seq.) states: "No provider of health care shall disclose medical information regarding a patient of the provider without first obtaining an authorization . . .." (Civ. Code, @ 56.10, subd. (a).) This core provision is followed by a long list of exceptions, couched in language that is anything but simple.

At issue here is this exception: "A provider of health care may disclose medical information . . . [P] . . . to organized committees and agents of professional societies or of medical staffs of licensed hospitals, or to licensed health care service plans, or to professional standards review organizations, or to utilization and quality control peer review organizations as established by Congress in Public Law 97-248 in 1982, or to persons or organizations insuring, responsible for, or defending professional liability which a provider may incur, if the committees, agents, plans, organizations, or persons are engaged in reviewing the competence or qualifications of health care professionals or in reviewing health care services with respect to medical necessity, level of care, quality of care, or justification of charges." (Civ. Code, @ 56.10, subd. (c)(4).)

This language, dense and opaque on first reading, appears on closer examination to fit the situation alleged in this case, in which a doctor (Yamaguchi) released to a representative of a professional liability carrier (Norcal), and to an attorney, medical information about a patient (plaintiff) who had asserted a claim of medical malpractice against another doctor (Geis) who was the carrier's insured and the attorney's client. To evaluate plaintiff's claim for settlement purposes, and to prepare a defense in the event of trial, Norcal and Geis's lawyer of necessity had to determine whether the professional services that Geis had supplied to plaintiff measured up to the prevailing standard

of care. To make that determination, they sought and obtained medical information in Yamaguchi's possession. Isolating the relevant statutory language, it appears that a doctor or other provider of health services may disclose medical information "to persons or organizations insuring, responsible for, or defending professional liability which a provider may incur, if the . . . organizations, or persons are engaged . . . in reviewing health care services with respect to . . . quality of care . . .." (Civ. Code, @ 56.10, subd. (c)(4).) That is precisely the situation alleged here. Accordingly, I agree with the majority that plaintiff has not stated a claim for violation of the Confidentiality of Medical Information Act.

I hasten to add two observations. First, the exception at issue here is permissive, not mandatory. When a patient has asserted a malpractice claim against one doctor, another doctor treating the same patient "may" disclose medical information to the insurer or attorney representing the accused doctor. (Civ. Code, @ 56.10, subd. (c)(4).) But in this situation the Confidentiality of Medical Information Act imposes no obligation on the doctor to disclose the medical information without the patient's consent.

Second, the statute says nothing about the circumstances under which the authorized disclosure of confidential medical information is to take place. Thus, the statute does not purport to answer the question whether such disclosure should be permitted to occur in secret, without prior notice to the patient. As I explain below, appellate courts throughout the nation have hotly debated this question, and this court should not attempt to resolve it in this case.

III. THE LITIGATION PRIVILEGE

Because it promotes the finality of judgments, encourages open channels of communication in judicial proceedings, and allows attorneys to zealously protect their clients' interests without fear of retribution by opposing litigants, the litigation privilege of Civil Code section 47, subdivision (b), has been given broad scope. (Silberg v. Anderson (1990) 50 Cal.3d 205, 213-214 [266 Cal.Rptr. 638, 786 P.2d 365].) Thus, the privilege is absolute and immunizes the

communications of parties, attorneys, and potential witnesses from tort liability on a wide variety of both common law and statutory theories, with the sole exceptions being liability for malicious prosecution (at pp. 215-216; see also Rubin v. Green (1993) 4 Cal.4th 1187 [17 Cal.Rptr.2d 828, 847 P.2d 1044]) and liabilities directly established by constitutional command. Here, the ex parte interview was a communication in the course of litigation and thus within the litigation privilege's zone of protection against all of plaintiff's causes of action, save only the claim for invasion of the constitutional right of privacy. (See Moses v. McWilliams (1988) 379 Pa.Super. 150 [549 A.2d 950].)

IV. THE CONSTITUTIONAL RIGHT OF PRIVACY

The California Constitution declares that "All people are by nature free and independent and have inalienable rights," and that among these inalienable rights are "obtaining safety, happiness, and privacy." (Cal. Const., art. I, @ 1.)

In Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1 [26 Cal.Rptr.2d 834, 865 P.2d 633], this court held that the privacy clause of the state Constitution "creates a right of action against private as well as government entities." (Hill v. National Collegiate Athletic Assn., supra, at p. 20.) We further held that the elements of a claim for violation of the constitutional privacy right are: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (at pp. 39-40.)

Here, both the majority and Justice Mosk conclude that plaintiff's complaint is defective as to the second element—the reasonable expectation of privacy. They note that by bringing a malpractice action against Dr. Geis, plaintiff opened her medical history to discovery as to matters put in issue by the allegations against Geis.

This is all true as far as it goes, but it does not defeat plaintiff's claim for violation of privacy. Plaintiff sued Dr. Geis for professional negligence in diagnosing and treating an infection of her finger. Any

medical information in the possession of Dr. Yamaguchi bearing on the issues of the existence of the alleged negligence or the extent of damages resulting from the alleged negligence would be directly relevant to the issues in the Geis litigation. As to any such information, plaintiff could have no reasonable expectation of privacy after asserting her malpractice claim. But she preserved her reasonable expectation of privacy as to any other information she imparted to Yamaguchi in confidence in the course of their doctor-patient relationship.

As this court has observed, "Plaintiff is not compelled, as a condition to entering the courtroom, to discard entirely her mantle of privacy." (Vinson v. Superior Court (1987) 43 Cal.3d 833, 841-842 [239 Cal.Rptr. 292, 740 P.2d 404].) Although the filing of a lawsuit may be deemed a waiver of privacy as to matters embraced by the action, we have emphasized that the scope of this waiver "must be narrowly rather than expansively construed." (Britt v. Superior Court (1978) 20 Cal.3d 844, 859 [143 Cal.Rptr. 695, 574 P.2d 766]; accord, Vinson v. Superior Court, supra, at p. 842.) Matters that would otherwise be protected by the constitutional privacy right are discoverable only if "directly relevant to the plaintiff's claim and essential to the fair resolution of the lawsuit." (Vinson v. Superior Court, supra, at p. 842.) The party seeking access to constitutionally protected information has the burden of proving direct relevance. (Davis v. Superior Court (1992) 7 Cal.App.4th 1008, 1017 [9 Cal.Rptr.2d 331].)

For example, the Court of Appeal has held that a plaintiff who seeks damages for personal injuries, including pain and suffering, does not thereby surrender the right to privacy in postinjury psychotherapeutic records. (Davis v. Superior Court, supra, 7 Cal.App.4th 1008, 1017.) The court summarized its conclusion this way: "By limiting her claim for emotional distress to pain and suffering associated with stated physical injuries, and by explaining that the [Cedar Women's Center] provided no treatment in connection with the injuries for which compensation was sought, petitioner established that it is not reasonably probable that the records are directly relevant to the condition she placed in issue." (Ibid.)

This court reached essentially the same conclusion when construing the scope of the patient-litigant exception to the doctor-patient privilege (Evid. Code, @ 996). As the Courts of Appeal have recognized, the doctor-patient privilege and the right of privacy are "closely related protections against public disclosure of private information." (Binder v. Superior Court (1987) 196 Cal. App. 3d 893, 899 [242 Cal.Rptr. 231]; accord, Davis v. Superior Court, supra, 7 Cal.App.4th 1008, 1013.)

In this state, the doctor-patient privilege protects "information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted, and includes a diagnosis made and the advice given by the physician in the course of that relationship." (Evid. Code, @ 992.) Under the patient-litigant exception, there is no doctor-patient privilege "as to a communication relevant to an issue concerning the patient if such issue has been tendered by" the patient or any party claiming through the patient. (Evid. Code, @ 996.)

In Britt v. Superior Court, supra, 20 Cal.3d 844, owners and residents of homes near an airport brought suit against the owner of the airport seeking, among other things, damages for personal injuries and emotional disturbance caused by the noise, vibrations, air pollution, and smoke produced by operation of the airport. During discovery, the airport owner served the plaintiffs with interrogatories demanding a complete account of each plaintiff's lifetime medical history, including any treatment for mental or emotional disturbance. In this court, the airport owner asserted that under the patient-litigant exception, a patient waived the doctor-patient and psychotherapist-patient privileges by instituting a claim for physical or mental injury. As we had done previously (see In re Lifschutz (1970) 2 Cal.3d 415, 435 [85 Cal.Rptr. 829, 467 P.2d 557, 44 A.L.R.3d 1]), this court "emphatically rejected such a broad rendition of the statutory exception." (Britt v. Superior

Court, supra, at p. 863.) We concluded that plaintiffs were "entitled to retain the confidentiality of all unrelated medical or psychotherapeutic treatment they may have undergone in the past." (at p. 864.)

Here, the complaint alleged, as I previously noted, that Dr. Yamaguchi disclosed to Norcal "private, intimate, personal, financial, and confidential medical information and records without the consent or knowledge of [plaintiff] or her attorney." Because the case comes before us on demurrer, we must assume that the allegations of the complaint are true, and we may not look beyond those allegations to ascertain the facts. To conclude, as the majority and Justice Mosk do, that all of the confidential material Yamaguchi disclosed to Norcal was directly relevant to plaintiff's malpractice claim against Dr. Geis and essential to that claim's fair resolution is sheer speculation, and improbable speculation at that. In particular, it is difficult to conceive how financial information, disclosed in confidence in the course of the doctor-patient relationship, could have any direct relevance to plaintiff's malpractice claim against Dr. Geis. n2

The majority asserts in a footnote that any information plaintiff disclosed to Yamaguchi concerning her financial and emotional state would be unrelated to her medical condition and for this reason not protected by the constitutional privacy right. (Maj. opn., ante, p. 43, fn. 4.) As authority for this assertion the majority cites only Kizer v. Sulnick (1988) 202 Cal. App. 3d 431, 439 [248 Cal.Rptr. 712], but in that case the court concluded that no doctor-patient relationship had existed. Here, it is undisputed that plaintiff was Dr. Yamaguchi's patient. Consistent with the Evidence Code's definition of confidential

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n2 The complaint alleges that Dr. Yamaguchi knew that plaintiff "was under extreme emotional pressure from the suit [against Dr. Geis] and her medical condition, that she was seeing a psychologist to treat her and that her monthly income was due to decrease as a result of a note being paid off." The complaint does not allege that Yamaguchi conveyed this precise information to Norcal, but this allegation illustrates the kind of confidential information, not relevant to plaintiff's claim against Geis, that Yamaguchi may have disclosed to Norcal or to Geis's attorney.

information provided in Evidence Code section 992 (that is, all information transmitted between patient and physician in the course of that relationship and in confidence), I would not exclude confidential information about a patient's emotional or financial condition from the reach of the constitutional privacy right merely because it may not have been strictly necessary to the task of diagnosing and treating the patient.

When a patient has disclosed information to a doctor in confidence, in the course of their professional relationship, a requirement that the information be medically relevant before it will qualify for legal protection is, in my view, destructive of the confidence and trust that are essential to a healthy physician-patient relationship, and it is inconsistent with the purposes of the constitutional privacy right. This is because patients generally cannot be expected to know when information is or is not medically relevant. As one court has put it: "Since the layman is unfamiliar with the road to recovery, he cannot sift the circumstances of his life and habits to determine what is information pertinent to his health. As a consequence, he must disclose all information in his consultations with his doctor—even that which is embarrassing, disgraceful or incriminating. To promote full disclosure, the medical profession extends the promise of secrecy . . .." (Hammonds v. Aetna Casualty & Surety Company (N.D.Ohio 1965) 243 F. Supp. 793, 801.) Not knowing when information is medically relevant, but advised by this court that only medically relevant information is protected, patients will be inhibited in relating sensitive or potentially embarrassing information to their physicians.

Because the complaint does not show on its face that all the information Dr. Yamaguchi disclosed was directly relevant to the matters at issue in plaintiff's action against Dr. Geis, I would permit plaintiff to proceed on her claim for violation of the constitutional privacy right.

V. EX PARTE INTERVIEWS WITH LITIGANT'S DOCTOR

Should the law permit a party litigant to privately interview and obtain medical information from the opposing party's doctor without

the opposing party's knowledge or consent? Published decisions of federal courts and courts of our sister states have debated this question with great thoroughness and have given conflicting answers. (See generally, Annot., Discovery: Right to Ex Parte Interview with Injured Party's Treating Physician (1986) 50 A.L.R.4th 714.) There is also no shortage of commentary in legal publications. (See, e.g., Woodard, Shielding the Plaintiff and Physician: The Prohibition of Ex Parte Contacts with a Plaintiff's Treating Physician (1991) 13 Campbell L.Rev. 233; Corboy, Ex Parte Contacts Between Plaintiff's Physician and Defense Attorneys: Protecting the Patient-Litigant's Right to a Fair Trial (1990) 21 Loy. U. Chi. L.J. 1001; Asher, Ex Parte Interview with Plaintiff's Treating Physicians—The Offensive Use of the Physician-Patient Privilege (1990) 67 U.Det. L.Rev. 501; Note, Restricting Ex Parte Interviews with Nonparty Treating Physicians: Crist v. Moffatt (1990) 69 N.C. L.Rev. 1381; Note, Defendants' Right to Conduct Ex Parte Interviews with Treating Physicians in Drug or Medical Device Cases (1989) 73 Minn. L.Rev. 1451.)

The question is not squarely posed here. We must decide in this case whether disclosure of medical information during an interview is an actionable violation of the Confidentiality of Medical Information Act, but a conclusion that the conduct is not actionable under the statute does not mean that courts are powerless to prevent such interviews or to impose conditions. Nevertheless, the majority's rather offhand disapproval of Torres v. Superior Court (1990) 221 Cal. App. 3d 181 [270 Cal.Rptr. 401] and Province v. Center for Women's Health & Family Birth (1993) 20 Cal.App.4th 1673 [25 Cal.Rptr.2d 667] "to the extent [they] could be read to prohibit all ex parte contacts between a physician and his [sic] attorneys or insurers" (maj. opn., ante, p. 41) makes further discussion necessary.

The relationship of doctor to patient is a fiduciary one. (Stafford v. Shultz (1954) 42 Cal.2d 767, 777 [270 P.2d 1].) A doctor has not only a legal obligation, grounded in the doctor-patient privilege (Evid. Code, @ 994) and the constitutional right of privacy (Cal. Const., art. I, @ 1), but also a professional obligation to maintain the secrecy of patient confidences. (See Bus. & Prof. Code, @ 2263 ["willful, unauthorized violation of professional confidence constitutes -39a-

unprofessional conduct"].) The Judicial Council of the American Medical Association puts it this way: "The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law." (Current Opinions of the Council on Ethics and Judicial Affairs of the American Medical Association (1986) @ 5.05, p. 21.)

As we have seen, a patient makes a limited waiver of the doctor-patient privilege by bringing an action for personal injury or medical malpractice. During the course of such litigation, the defendants have a right to discover any information in the possession of the plaintiff's treating physicians that is directly relevant to matters at issue and essential to their fair resolution. Thus, the question is not whether relevant information must be disclosed, but the method of such disclosure. (See Manion v. N.P.W. Medical Center (M.D.Pa. 1987) 676 F. Supp. 585, 593 [". . . the prohibition against unauthorized ex parte contacts . . . affects defense counsel's methods, not the substance of what is discoverable"].)

Some courts see no reason to bar or restrict defense counsel from conducting ex parte interviews of the plaintiff's treating physicians (e.g., Lewis v. Roderick (R.I. 1992) 617 A.2d 119; Domako v. Rowe (1991) 438 Mich. 347, 360 [475 N.W.2d 30, 36]; Felder v. Wyman (D.S.C. 1991) 139 F.R.D. 85; Coralluzzo v. Fass (Fla. 1984) 450 So. 2d 858; Doe v. Eli Lilly & Co. (D.D.C. 1983) 99 F.R.D. 126; Trans-World Investments v. Drobny (Alaska 1976) 554 P.2d 1148, 1152), and in fact have directed plaintiffs to execute authorization forms to facilitate the interviews. These courts emphasize, as does the majority here, that private interviews save time and money when compared to more formal methods of discovery (Domako v. Rowe, supra, 438 Mich. at p. 361; Doe v. Eli Lilly & Co., supra, at p. 128), and that the

information disclosed in the ex parte interviews would be disclosed eventually anyway. They also maintain that private interviews are "conducive to spontaneity and candor in a way depositions can never be" (Doe v. Eli Lilly & Co., supra, at p. 128) and that they speed the settlement process by encouraging early investigation and evaluation of claims (Trans-World Investments v. Drobny, supra, 544 P.2d at p. 1152; Domako v. Rowe, supra, 438 Mich. at p. 361).

Taking a contrary position, other courts have held that in medical malpractice or personal injury litigation, defense counsel should never be permitted to interview a plaintiff's nonparty treating physician ex parte without the plaintiff's consent. (State ex rel. Kitzmiller v. Henning (1993) 190 W.Va. 142 [437 S.E.2d 452]; Cua v. Morrison (Ind. June 28, 1994) N.E.2d , adopting opn. published at 626 N.E.2d 581; Crist v. Moff .. (1990) 326 N.C. 326, 332 [389 S.E.2d 41, 45]; Duquette v. Superior Court (1989) 161 Ariz. 269 [778 P.2d 634]; Loudon v. Mhyre (1988) 110 Wn.2d 675 [756 P.2d 138]; Linton v. City of Great Falls (1988) 230 Mont. 122 [749 P.2d 55]; Petrillo v. Syntex Laboratories, Inc. (1987) 148 Ill.App.3d 581, 591 [102 Ill.Dec. 172, 499 N.E.2d 952]; Nelson v. Lewis (1987) 130 N.H. 106 [534 A.2d 720]; Smith v. Ashby (1987) 106 N.M. 358 [743 P.2d 114]; Roosevelt Hotel Ltd. Partnership v. Sweeney (Iowa 1986) 394 N.W.2d 353; Weaver v. Mann (D.N.D. 1981) 90 F.R.D. 443, 445; Anker v. Brodnitz (1979) 98 Misc.2d 148, [413 N.Y.S.2d 582]; Wenninger v. Muesing (1976) 307 Minn. 405 [240 N.W.2d 333]; Fields v. McNamara (1975) 189 Colo. 284 [540 P.2d 327]; Hammonds v. Aetna Casualty & Surety Company, supra, 243 F. Supp. 793.) n3

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n3 The Missouri Supreme Court has held that a plaintiff in a personal injury action may not be compelled to authorize defense counsel to meet ex parte with the plaintiff's treating physicians. (State ex rel. Woytus v. Ryan (Mo. 1989) 776 S.W.2d 389, 395.) If the treating physician meets with defense counsel without the plaintiff's consent and reveals confidential information not relevant to the personal injury action, the plaintiff may sue the physician for damages resulting from the unauthorized disclosure. (Brandt v. Medical Defense Associates (Mo. 1993) 856 S.W.2d 667, 670.) In the underlying personal injury action, however, the defense is free to use any evidence developed by the interview; the plaintiff has no sanction or remedy available. (Brandt v. Pelican (Mo. 1993) 856 S.W.2d 658, 662.)

These courts point out that the spontaneity and candor that is one of the claimed virtues of informal interviews is also its principal vice. In the relaxed atmosphere of a private interview, nonparty treating physician may be led to disclose confidential information not relevant to the litigation and therefore protected by the doctor-patient privilege and the doctor's professional obligation to preserve confidentiality. n4 (See, e.g., Karsten v. McCray (1987) 157 Ill.App.3d 1, 14 [509 N.E.2d 1376, 1384]; Wenninger v. Muesing, supra, 307 Minn. 405, 410-411 [240 N.E.2d 333, 336-337]; Manion v. N.P.W. Medical Center, supra, 676 F. Supp. 585, 594.)

The very possibility of unauthorized disclosure, these courts maintain, is destructive of the trust essential to a secure and productive doctor-patient relationship: "The presence of the patient's counsel at the doctor's interrogation permits the patient to know what his doctor's testimony is, allays a patient's fears that his doctor may be disclosing personal confidences, and thus helps preserve the complete trust between doctor and patient which is essential to the successful treatment of the patient's condition." (Wenninger v. Muesing, supra, 307 Minn. 405, 411 [240 N.W.2d 333, 337]; accord, Manion v. N.P.W. Medical Center, supra, 676 F. Supp. 585, 594; Loudon v. Mhyre, supra, 110 Wn.2d 675, 679 [756 P.2d 138, 141].) In medical malpractice actions, moreover, defense counsel may use an ex parte interview with the plaintiff's doctor to solicit sympathy for the defendant, and thereby compromise the doctor's loyalty to the patient: "An unauthorized ex parte interview could disintegrate into a discussion of the impact of a jury's award upon a physician's professional reputation,

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n4 The following comment is typical: "The possibility of inadvertent wrongful disclosure of confidential matters troubles us. We do not mean to question the integrity of doctors and lawyers or to suggest that we must control discovery in order to assure their ethical conduct. We are concerned, however, with the difficulty of determining whether a particular piece of information is relevant to the claim being litigated. Placing the burden of determining relevancy on an attorney, who does not know the nature of the confidential disclosure about to be elicited, is risky. Asking the physician, untrained in the law, to assume this burden is a greater gamble and is unfair to the physician. We believe this determination is better made in a setting in which counsel for each party is present and the court is available to settle disputes." (Roosevelt Hotel Ltd. Partnership v. Sweeney, supra, 394 N.W.2d 353, 357.)

the rising cost of malpractice insurance premiums, the notion that the treating physician might be the next person to be sued, and other topics which might influence the treating physician's views. The potential for impropriety grows even larger when defense counsel represents the treating physician's own insurance carrier . . .." (Manion v. N.P.W. Medical Center, supra, 676 F. Supp. 585, 594-595; see also Duquette v. Superior Court, supra, 161 Ariz. 269, 276 [778 P.2d 634,]; Anker v. Brodnitz, supra, 98 Misc.2d 148, 153 [413 N.Y.S.2d 582, 585].)

The New Jersey Supreme Court has articulated a middle ground, in an attempt to reconcile the competing interests. In Stempler v. Speidell (1985) 100 N.J. 368 [495 A.2d 857, 50 A.L.R.4th 699], the court crafted a rule under which plaintiffs may be required to authorize their treating physicians to hold ex parte interviews with attorneys for the defendants, but on the condition that the defense lawyers provide the plaintiff's lawyers with reasonable notice of the time and place of the interviews, a description of the anticipated scope of the interviews, and assurances that the physicians will be advised that their participation is entirely voluntary. The aim of the procedure is to provide plaintiffs' lawyers with an opportunity to advise the doctors in advance of "any appropriate concerns as to the proper scope of the interview, and the extent to which plaintiff continues to assert the patient-physician privilege with respect to that physician." (at p. 382 [495 A.2d at p. 864].) The court recognized that in particular cases these safeguards might not be adequate: "Plaintiff may also seek and obtain a protective order if under the circumstances a proposed ex parte interview with a specific physician threatens to cause such substantial prejudice to plaintiff as to warrant the supervision of the trial court. Such supervision could take the form of an order requiring the presence of plaintiff's counsel during the interview or, in extreme cases, requiring defendant's counsel to proceed by deposition." (at p. 383 [495 A.2d at pp. 864-865].)

The majority does not suggest that a court could order a plaintiff to authorize defense counsel to interview the plaintiff's treating physicians ex parte. Absent such authorization, I would expect that

few defense counsel would attempt to interview a plaintiff's treating physician and few physicians would consent to be interviewed. n5

As I understand it, the majority holds only that if an ex parte interview does occur without the plaintiff's knowledge or consent, the physician does not thereby violate the Confidentiality of Medical Information Act and that Norcal's ex parte interviews of Yamaguchi are not actionable under the facts of this case. Given this limited holding, issues concerning the propriety of ex parte interviews of nonparty treating physicians are certain to reach this court again. As has occurred in other states, such issues may arise when a plaintiff, invoking a trial court's inherent authority to supervise discovery, moves for a protective order to bar or restrict ex parte interviews, or when a plaintiff moves at trial to exclude information disclosed during such interviews. When these issues return, in this or some other manner, I would hope that this court gives them the thorough consideration and analysis they deserve.

CONCLUSION

"The right of privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relationship." (Doe v. Bolton (1973) 410 U.S. 179, 219 [35 L. Ed. 2d 201, 191, 93 S.Ct. 739] (conc. opn. of Douglas, J.).) For violation of that privacy right, our state Constitution provides a remedy by means of an action for damages. Here, plaintiff's complaint alleges that her

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n5 I assume that most defense counsel will follow the advice of a leading treatise on the law of medical malpractice: "[W]here there is no clear statute or rule permitting otherwise, defense counsel should confer with non-party physicians who treated plaintiff only with the knowledge and consent of the plaintiff and counsel. Not only is that the fair way, it avoids any implication of collusion or conspiracy which may appear from clandestine consultations. To the same end, plaintiff's counsel should cooperate in voluntarily facilitating this aspect of the defense attorney's job." (1 Louisell & Williams, Medical Malpractice (1993) @ 12.05, p. 12-12.)

treating physician, Yamaguchi, engaged in wide-ranging ex parte discussions that may have disclosed intimate matters not relevant to plaintiff's pending malpractice action. I would hold that plaintiff has stated a claim under our state Constitution for violation of her right of privacy.

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

DORIS HELLER,	)	
	)	
Plaintiff and Appellant,	)	Nos. F105875
	)	and F016047
v.	)	
	)	
NORCAL MUTUAL	)	
INSURANCE COMPANY et al.,	)	(Super.Ct.
	)	No. 4-05369-0)
Defendants and Respondents.	)	
	)	
	)	OPINION
	)	
DORIS HELLER, Petitioner,	)	
	)	
v.	)	
	)	
THE SUPERIOR COURT	)	
OF FRESNO COUNTY,	)	
	)	
Respondent;	)	
	)	
NORCAL MUTUAL	)	
INSURANCE COMPANY et al.,	)	
	)	
Real Parties in Interest.	)	
	)	

PRIOR HISTORY: Superior Court of Fresno County, No. 405369-0, Gary R. Kerkorian, Judge.

DISPOSITION: The judgment of dismissal in favor of respondent Central California Faculty Medical Group, Inc. is affirmed. Costs on appeal are awarded to respondent and against appellant.

COUNSEL:

Roger K. Vehrs, Tritt & Tritt and James F. Tritt for Plaintiff and Appellant and Petitioner.

Diehl, Steinheimer, Riggio, Haydel & Mordaunt, M. Max Steinheimer, Bryan D. Smith, Joseph H. Fagundes, Anderson, Galloway & Lucchese, G. Patrick Galloway, Karen A. Sparks, Diepenbrock, Wulff, Plant & Hannigan, Dennis M. Campos, Sean O. Sheridan and John R. Haluck for Defendants and Respondents and Real Parties in Interest.

No appearance for Respondent Superior Court.

JUDGES: Opinion by Stone W. A., Acting P. J., with Dibiaso, J., and Franson, J., concurring.

OPINION BY: STONE (W. A.), Acting P. J.

OPINION:

I

INTRODUCTION

While the parties have raised various procedural issues, we need not reach them in light of our resolution of the substantive issues concerning the sufficiency of the allegations of the second through twelfth causes of action of the fourth amended complaint. Plaintiff Doris Heller names as defendants in her fourth amended complaint Norcal Mutual Insurance Company (Norcal), Kent Yamaguchi, M.D. (Yamaguchi), Herbert W. Boro, M.D. (Boro), Valley Plastic Surgeons Medical Group, Inc. (VPSMG), and Central California Faculty Medical Group, Inc. (CCFMG).

Plaintiff filed a complaint, a first amended complaint, a second amended complaint, and a third amended complaint, all of which were the subject of various demurrers, motions for judgment on the pleadings, and other procedural maneuvers. She filed her fourth amended complaint following the court's order allowing her to amend. All defendants demurred to various allegations of the fourth amended complaint, moved to strike portions of that complaint, and sought judgment on the pleadings on certain causes of action. Ultimately, the court sustained without leave to amend the demurrers of all defendants to all causes of action except the first cause of action against Yamaguchi for negligence, which Yamaguchi did not attack by demurrer. One basis for sustaining the demurrers was the privilege provided by Civil Code n1 section 47, subdivision 2. n2 Following the orders sustaining the demurrers, the court entered judgments of dismissal in favor of defendants Norcal, Boro, VPSMG and CCFMG, from which plaintiff appeals. In addition, plaintiff seeks a writ of mandate compelling the trial court to set aside its order sustaining the demurrers of Yamaguchi without leave to amend. We ordered the actions consolidated.

"2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure; . . ."

II.

THE ALLEGATIONS

The fourth amended complaint sets out general allegations which we recite at some length, with emphasis on certain portions important to our discussion:

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n1 All statutory references are to the Civil Code unless otherwise noted.

n2 "A privileged publication or broadcast is one made—

". . . On or about June 9, 1987, Ms. Heller, a left handed bookkeeper, was admitted to Sierra Hospital for the removal of a bone spur from her left hand. Shortly thereafter, Ms. Heller developed a postoperative staphylococcal infection, which was diagnosed and negligently treated by Dr. Geis, M.D.

". . . On or about July 4, 1987, Ms. Heller was admitted to Sierra Hospital and on July 7, 1987, the left third digit was amputated at the mid-proximal phalanx. Said amputation was performed by Dr. Yamaguchi and Dr. Geis, and it was on or about that time that Dr. Yamaguchi began to provide medical care and treatment for Ms. Heller.

". . . On or about September 4, 1987, Ms. Heller was again admitted to Sierra Hospital and the entire left third digit was amputated. Said amputation was performed by Dr. Yamaguchi and Dr. Geis.

". . . At a time unknown to Ms. Heller but shortly after the second amputation, she developed reflex sympathetic dystrophy. On or about September 21, 1987, Dr. Yamaguchi started to treat Ms. Heller for said dystrophy. . . .

". . . On or about March 15, 1988, . . . Dr. Yamaguchi excised neuromas from the radial and ulmar digital nerves of the third digit.

". . . Throughout the entire post-operative care and treatment of Ms. Heller, representations were made to her by Dr. Yamaguchi that there was nothing further that could be done for her and that she would have to live with the pain, keep her hand elevated and use a pressurized glove the rest of her life. Ms. Heller placed great trust and reliance on his representations, as he held himself out to be a specialist.

". . . On or about June 9, 1988, Ms. Heller commenced suit against Dr. Geis. On or about January 12, 1989, during the deposition of Dr. Yamaguchi, it was revealed to Ms. Heller's attorney that, Norcal Mutual Insurance Company (Dr. Geis' insurer), by and through its managerial employees, secretly interviewed Dr. Yamaguchi on several occasions in late 1988 and early 1989. [Heller] . . . believes that there were other contacts and that on all such occasions, Defendants, Norcal

Mutual Insurance Company and Dr. Yamaguchi, conspired and agreed to obtain and release private intimate, personal, financial, and confidential medical information and records without the consent or knowledge of Ms. Heller or her attorney. Said records and information was [sic] obtained and provided to Norcal in order to obtain an economic advantage over Ms. Heller in her suit against Dr. Geis; and, further, to benefit all of the other Defendants in their insurance premiums and to, additionally, benefit them financially.

". . . Plaintiff is informed and believes and thereon alleges that from June 15, 1988 and continuing through January 12, 1989, Dr. Yamaguchi and Dr. Borro [sic] conspired with Norcal Mutual Insurance Company in order to benefit Dr. Geis and Norcal Mutual Insurance Company in lowering the damage award of their patient, Doris Heller. Initially, Dr. Yamaguchi and Dr. Borro [sic] agreed to meet secretly with Norcal Mutual Insurance Company employees and provide them with information regarding the Plaintiff's current physical condition and their prognosis for her future medical course and treatment. After said information was provided, Norcal Mutual Insurance Company contacted Dr. Yamaguchi by and through their authorized agent and requested that he testify falsely that the treatment by Dr. Geis was within the standard of care and, as such, the Plaintiff would then not have a lawful claim for damages. Dr. Yamaguchi and Norcal Mutual Insurance Company then and there conspired and agreed amongst themselves to use a tailored set of medical records, from which the doctor could conclude that the treatment plan of Dr. Geis was within the standard of care. In truth and fact, Dr. Yamaguchi and Norcal were aware of the fact that the medical records contained false, fraudulent and misleading information and that that information would be used to support his false testimony that Dr. Geis' treatment was within the standard of care in this community. Further, Dr. Yamaguchi agreed to use his position as Plaintiff's treating physician to testify as an expert witness for Dr. Geis against the Plaintiff at deposition and trial, with the intent of causing her to drop or reduce her claim. All of said actions were done against the medical interest of Ms. Heller and were done to gain a wrongful advantage for Norcal Mutual Insurance Company, Dr. Geis, Dr. Yamaguchi, Dr. Borro

". . . .

". . . Throughout the course of Plaintiff's treatment, Dr. Yamaguchi attempted to coerce her into a settlement of her claim . . . and, further attempted to persuade and coerce Ms. Heller to compromise her claim against Dr. Geis for approximately one-half of what she finally received. . ..

". . . Dr. Yamaguchi met with Norcal Mutual Insurance Compamy employees and agents and formulated a treatment plan and a psychological program to effectuate a settlement of Plaintiff's claim for her medical injury occasioned by Dr. Geis[.]" (Italics added.)

Based upon these general allegations plaintiff set out 12 causes of actions. We summarize the second through 12th causes of action in this manner:

THE SECOND CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AGAINST YAMAGUCHI AND VPSMG:

Yamaguchi (1) agreed to testify falsely against plaintiff to the benefit of Dr. Geis and Norcal; (2) released confidential medical information to unauthorized persons; and (3) acted outside his capacity as treating physician in order to control the lawsuit against Dr. Geis.

THE THIRD CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AGAINST CCFMG:

CCFMG failed to supervise its employee, Yamaguchi, and wrongfully authorized Yamaguchi to release information to Norcal for the benefit of CCFMG, Norcal, and Dr. Geis.

THE FOURTH CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AGAINST NORCAL:

Norcal obtained private and confidential information from plaintiff's treating physician and retained that physician to testify as an expert.

THE FIFTH CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST YAMAGUCHI AND NORCAL:

The acts set out in the fourth cause of action were intentional.

THE SIXTH CAUSE OF ACTION FOR INTERFERENCE WITH PHYSICIAN-PATIENT CONTRACTUAL RELATIONSHIP AGAINST NORCAL:

After plaintiff and Yamaguchi established a physician-patient relationship, Norcal interposed a financial relationship with Yamaguchi. Norcal engaged the services of the physician to act as its agent to control plaintiff's decisions regarding her treatment and to accomplish a settlement with Dr. Geis.

SEVENTH CAUSE OF ACTION FOR WRONGFUL DISCLOSURE OF CONFIDENTIAL MEDICAL INFORMATION AGAINST YAMAGUCHI AND VPSMG:

Yamaguchi, as agent of VPSMG, obtained confidential medical and other related information from plaintiff regarding her current and

past medical condition and disclosed it to Norcal without plaintiff's authorization, in violation of the Confidentiality of Medical Information Act. Plaintiff specifically pleads portions of that act, Sections 56.10, 56.20, and 56.26, subdivision (a). n3

EIGHTH CAUSE OF ACTION FOR WRONGFUL DISCLOSURE OF CONFIDENTIAL MEDICAL INFORMATION AGAINST YAMAGUCHI AND VPSMG:

This cause of action repeats the allegations of the seventh cause of action, but adds that Yamaguchi disclosed information to Attorney Weiss, again in violation of the Confidentiality of Medical Information Act.

THE NINTH CAUSE OF ACTION FOR WRONGFUL DISCLOSURE OF CONFIDENTIAL MEDICAL INFORMATION AGAINST BORO:

Boro was also a treating physician who released medical information to Norcal, its agents, Attorney Weiss, and other unknown persons without plaintiff's authorization. Here, too, plaintiff pleads the Confidentiality of Medical Information Act.

THE 10TH CAUSE OF ACTION FOR UNFAIR BUSINESS PRACTICES AGAINST YAMAGUCHI, VPSMG AND NORCAL:

In violation of Business and Professions Code section 17200, Norcal entered into an agreement with Yamaguchi to use the physician-patient relationship to help Dr. Geis.

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n3 Section 56.10 prohibits a health care provider from disclosing medical information regarding a patient of the provider without authorization, with certain exceptions not relevant here. Section 56.20 requires health care providers to establish procedures to ensure the confidentiality of patient medical information.

Section 56.26, subdivision (a) prohibits administrators of health plans from disclosing medical information.

THE 11TH CAUSE OF ACTION FOR CONCEALMENT AGAINST YAMAGUCHI, VPSMG AND NORCAL:

Upon entering into the agreement to treat plaintiff, Yamaguchi conspired and agreed with Norcal to conceal and suppress material facts during the course of medical treatment concerning his efforts to assist Dr. Geis.

12TH CAUSE OF ACTION FOR VIOLATION OF CONSTITUTIONAL RIGHT OF PRIVACY AGAINST YAMAGUCHI AND NORCAL:

Yamaguchi violated plaintiff's constitutional right to privacy by secretly disclosing confidential and private information to Norcal and its agents and employees.

DISCUSSION

III.

STANDARD OF REVIEW

Our role when reviewing a trial court's order sustaining a general demurrer is clear: We consider all properly pleaded allegations to be true and give the pleading a reasonable interpretation, construing it as a whole and its parts in context. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].)

IV.

DEFENDANTS' PRIVILEGE

The issue we shall consider first is whether defendants' conduct falls within the privilege afforded by section 47. n4 The purpose

n4 Section 47 was amended in 1990 (Stats. 1990, ch. 1491, @ 1). For purposes of our discussion the changes made in that amendment are not significant, although the designation of the subdivisions was changed from numerals to letters (i.e., to subdivisions (a) and (b) from (1) and (2)). For purposes of consistency, we will continue to use the numerical subdivision designations in our discussion.

underlying the immunity afforded by the section has been expressed by the Supreme Court in Silberg v. Anderson (1990) 50 Cal.3d 205 [266 Cal.Rptr. 638, 786 P.2d 365]:

"The principal purpose of section 47(2) is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. [Citations.]

"Section 47(2) promotes the effectiveness of judicial proceedings by encouraging 'open channels of communication and the presentation of evidence' in judicial proceedings. [Citation.] A further purpose of the privilege 'is to assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing.' [Citations.] Such open communication is 'a fundamental adjunct to the right of access to judicial and quasi-judicial proceedings.' [Citation.] Since the 'external threat of liability is destructive of this fundamental right and inconsistent with the effective administration of justice' [citation], courts have applied the privilege to eliminate the threat of liability for communications made during all kinds of truth-seeking proceedings: judicial, quasi-judicial, legislative and other official proceedings.

". . . .

"Section 47(2) further promotes the effectiveness of judicial proceedings by encouraging attorneys to zealously protect their clients' interests. '[I]t is desirable to create an absolute privilege . . . not because we desire to protect the shady practitioner, but because we do not want the honest one to have to be concerned with [subsequent derivative] actions . . .. [Citation.]

"Finally, in immunizing participants from liability for torts arising from communications made during judicial proceedings, the law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality

of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result. [Citations.]" (Silberg v. Anderson, supra, 50 Cal.3d 205, 213-214.)

In Kimmel v. Goland (1990) 51 Cal.3d 202 [271 Cal.Rptr. 191, 793 P.2d 524], a group of mobilehome owners, in anticipation of a lawsuit against the management of their mobilehome park, tape-recorded telephone conversations with management representatives in order to preserve representations which the mobile home owners suspected management would later deny. The acts of recording were themselves violations of Penal Code section 632, a part of California's Invasion of Privacy Act. The mobilehome owners did file suit, and upon learning of the telephone conversation recordings, the management cross-complained specifically alleging a violation of Penal Code section 632 and seeking damages pursuant to Penal Code section 637.2, subdivision (a). n5 In reviewing an order granting summary judgment the Supreme Court held:

"The central issue we address is whether the litigation privilege of section 47(2) applies to plaintiffs' conduct. Our analysis starts from the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] In determining intent, we look first to the language of the statute, giving effect to its 'plain meaning.'
[Citation.]

"On its face, section 47(2) applies to all 'publication[s] or broadcast[s]' made in the course of a 'judicial proceeding.' Although the litigation privilege was originally limited to shielding litigants, attorneys and witnesses from liability for defamation [citation], it has been interpreted to apply to virtually all torts except malicious prosecution. [Citations.] This includes the tort of invasion of privacy. [Citations.]

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n5 Penal Code section 637.2, subdivision (a) allows damages in the amount of either $3,000 or three times the actual damages suffered, whichever is greater.

"We recently held in Silberg v. Anderson, supra, 50 Cal.3d at page 212, that the privilege of section 47(2) extends to any communication: '(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that [has] some connection or logical relation to the action.' [Citations.]" (Kimmel v. Goland, supra, 51 Cal.3d at pp. 208-209.)

The court noted the parties asserting immunity did not cite "a single case in which section 47(2) has been held to bar suit for personal injuries arising from noncommunicative conduct that occurred during a judicial proceeding. On the contrary, a review of the myriad cases that have applied section 47(2) to shield defendants from liability demonstrates that, without exception, the privilege has applied only to torts arising from statements or publications. [Citations.]" (Kimmel v. Goland, supra, 51 Cal.3d at p. 211.)

Finding that immunity did not apply, the court again reiterated the tortious act alleged by the mobilehome park management was the recording of the conversations, not their broadcast, publication or subsequent use in a lawsuit. (Kimmel v. Goland, supra, 51 Cal.3d at p. 212.) The court continued:

"[S]ince [the] right to a statutory remedy accrued at the moment of the violation [the] contention that the telephone conversations were made in anticipation of litigation is simply irrelevant. Penal Code section 637.2 was intended 'to provide those who suffer an infringement of this aspect of their personal liberty a means of vindicating their right.' [Citation.]

"Finally, we note that the result urged by [the party making the recordings], an extension of section 47(2) to unlawful conduct undertaken to obtain evidence in anticipation of litigation, would lead to unacceptable consequences. Suppose, a prospective defendant kept important documents at home. If a prospective plaintiff, in anticipation of litigation, burglarized defendant's premises in order to obtain evidence, plaintiffs here would apparently apply the privilege to protect the criminal conduct. Such an extension of section 47(2) is untenable.

The instant case and the example are comparable in that both involve violation of a penal statute, and in both cases the offending party seeks immunity from civil liability. In both, the claim must fail." (Kimmel v. Goland, supra, 51 Cal.3d at p. 212.)

To explain the distinction between a defendant's conduct which causes an injury to a plaintiff at the moment that conduct occurs and a defendant's conduct which causes injury to a plaintiff only by use in a judicial or legislative proceeding, the Kimmel court drew upon the reasoning in its earlier case, Ribas v. Clark (1985) 38 Cal.3d 355 [212 Cal.Rptr. 143, 696 P.2d 637, 49 A.L.R.4th 417]. In Ribas an attorney for a wife in a dissolution proceeding eavesdropped on a telephone conversation between husband and wife. The attorney used the information he had obtained during the conversation in a subsequent arbitration hearing. Thereafter, husband sought damages against the attorney pursuant to Penal Code sections 631, subdivision (a) and 637.2. The court held the conduct upon which plaintiff based his cause of action pursuant to the privacy act and the statutory civil award it provided was not subject to a section 47, subdivision (2) privilege. The court continued, "but [ ] his action was barred insofar as it was based on 'his common law right to privacy, because his alleged injury stems solely from defendant's testimony at the arbitration proceeding. [Citations.]' (38 Cal.3d at p. 364, italics added.)" (Kimmel v. Goland, supra, 51 Cal.3d at p. at p. 210.)

The Kimmel court explained further:

"Implicit in the Ribas decision was the distinction between injury allegedly arising from communicative acts, i.e., the attorney's testimony, and injury resulting from noncommunicative conduct, i.e., the invasion of privacy resulting from the attorney's eavesdropping. This distinction has traditionally served as a threshold issue in determining the applicability of section 47(2). For example, in Westlake Community Hospital v. Superior Court (1976) 17 Cal.3d 465 [131 Cal.Rptr. 90, 551 P.2d 410], we were required to determine whether a hospital was immune under section 47(2) from liability for the termination of a physician's staff privileges. We noted that the doctor's 'claim [was] not that her injury ha[d] been occasioned simply by [the hospital's] malicious statements at

the proceedings, but rather that she ha[d] been injured by the malicious actions of the hospital . . . in revoking her staff privileges . . .." (Kimmel v. Goland, supra, 51 Cal.3d at p. 211.)

The cases from the Courts of Appeal are legion on the subject. We use one from our own district to illustrate our point—Pettitt v. Levy (1972) 28 Cal.App.3d 484 [104 Cal.Rptr. 650]. Plaintiff alleged defendant altered a copy of a document and presented that altered copy to a city planning commission in order to defeat plaintiff's request for a zoning variance. In his suit alleging several causes of action based upon this conduct, the court held that although altering the document in order to obtain a desired result at the planning commission hearing is heinous conduct, it was nonetheless privileged by section 47, subdivision (2) because plaintiff's injury occurred only from the use of that altered document in a quasi-judicial proceeding. Altering the document, by itself, caused plaintiff no injury.

We now turn to the allegations of plaintiff's fourth amended complaint.

A. THE SECOND THROUGH 11TH CAUSES OF ACTION.

The second, third, fourth, fifth, sixth and 11th causes of action are all grounded in common law torts—negligent and intentional infliction of emotional distress, interference with the physician-patient relationship, and concealment. Plaintiff claims she suffered injury because in her litigation against Dr. Geis the defendants used information they had wrongfully obtained. Under the rationale of Kimmel and Ribas, the trial court correctly ruled section 47, subdivision (2) prevents recovery on these causes of action.

We skip now to the 10th cause of action for unfair business practices in violation of Business and Professions Code section 17200 et seq. Regarding such allegations the California Supreme Court has recently spoken in Rubin v. Green —the privilege afforded by section 47, subdivision (2) applies whether the plaintiff seeks damages or injunctive relief based upon unfair business practices. (Rubin v. Green, supra, 4 Cal.4th at pp. 1200-1204.)

The seventh, eighth and ninth causes of action of the fourth amended complaint present another story. As we have noted, they plead violations of the Confidentiality of Medical Information Act, and specifically refer to sections 56.10, 56.20 and 56.26.

Sections 56.35 and 56.36 provide remedies for violations of the act—the former authorizing civil recovery of compensatory damages, punitive damages not to exceed $3,000, attorney fees not to exceed $1,000, and cost of suit. Section 56.36 makes a violation a misdemeanor in the event the patient suffers economic loss or personal injury. Thus, the allegations of the seventh, eighth and ninth causes of action of the fourth amended complaint place this case squarely within the holdings of Kimmel and Ribas, and plaintiff has stated viable causes of action to that extent. Just as the plaintiffs in Kimmel and Ribas stated independent causes of action created by Penal Code sections 631, 632 and 637.2, so here plaintiff bases her claims upon the Confidentiality of Medical Information Act and the remedies that act provides, independent of any injury she may have suffered by use of information in the Geis litigation.

Three of the defendants—Yamaguchi, CCFMG and VPSMG——argue section 56.10, subdivision (c)(4) renders the general prohibition of disclosure in section 56.10 inapplicable. In their responsive brief they quote the subdivision in part:

"(c) a provider of healthcare may disclose medical information as follows:

"(4) the information may be disclosed to . . . persons or organizations insuring, responsible for, or defending professional liability which a provider may incur . . .." They then argue that "a provider" referred to in subdivision (4) need not be the same "provider" referred to in subdivision (c), and because both Yamaguchi and Dr. Geis were providers, their disclosure of medical information was authorized.

What these defendants fail to note is the rest of subdivision (4): "[i]f the . . . organizations, or persons are engaged in reviewing the

competence or qualifications of health care professionals or in reviewing health care services with respect to medical necessity, level of care, quality of care, or justification of charges."

Clearly, section 56.10, subdivision (c)(4), the exception which Yamaguchi, VPSMG and CCFMG cite, has no relevance to this case.

The privilege afforded by section 47, subdivision (2) does not extend to the seventh, eighth and ninth causes of action of the fourth amended complaint.

B. THE 12TH CAUSE OF ACTION.

The 12th cause of action names as defendants only Yamaguchi and Norcal, and alleges the conduct described in the general allegations violates plaintiff's constitutional right of privacy. Article I, section 1, of the California Constitution creates a right of privacy. (Urbaniak v. Newton (1991) 226 Cal.App.3d 1128, 1136 [277 Cal.Rptr. 354].) The provision is self-executing, conferring a judicial right of action for its breach. (Porten v. University of San Francisco (1976) 64 Cal.App.3d 825, 829 [134 Cal.Rptr. 839].) The crucial question is whether a statutory privilege (@ 47, subd. 2) renders a defendant immune from liability for conduct prohibited by a constitutional provision. We will conclude, based upon settled law, that a statute cannot immunize from liability conduct made actionable by the California Constitution.

That an unauthorized disclosure of medical information gives rise to an action for a violation of the right of privacy is settled in Urbaniak v. Newton, supra, 226 Cal.App.3d 1128. Urbaniak filed a workers' compensation claim and, after giving consent, was examined by Dr. Newton, who was employed for this purpose by the workers' compensation insurance carrier. (at p. 1134.) According to Urbaniak, after the examination he mentioned to Newton's nurse he had tested HIV positive and advised her to sterilize the probes used by Dr. Newton during the examination. (Ibid.) Dr. Newton's nurse passed this information on to the doctor. Dr. Newton mentioned in his report to counsel for the workers' compensation carrier that Urbaniak was an

AIDS victim. The carrier eventually received the report from its counsel. In the report Dr. Newton discounted the work injury as the cause of Urbaniak's symptoms, and suggested instead stress from AIDS-related health problems may have caused them. (Ibid.)

The trial court granted summary judgment in defendants' favor, and Urbaniak appealed. On appeal, the court drew from Porten v. University of San Francisco, supra, 64 Cal.App.3d 825: "In the Porten case, the complaint alleged that the defendant had without permission disclosed a portion of the plaintiff's academic record to a state scholarship commission. Reviewing a judgment of dismissal on demurrer, the court agreed that the complaint failed to state a tort cause of action for 'public disclosure of private facts' since the disclosure to the state commission 'was not a communication to the public.' (Porten v. University of San Francisco, supra, 64 Cal.App.3d at p. 828.) It held, however, that the complaint stated a 'prima facie violation of the state constitutional right of privacy' based on 'the improper use of information properly obtained for a specific purpose.' (at p. 832.)" (Urbaniak v. Newton, supra, 226 Cal.App.3d at p. 1138.)

The Urbaniak court determined the use of the disclosure that Urbaniak had tested positive for the HIV virus for a purpose other than for which Urbaniak had intended created a violation of his right of privacy pursuant to article I, section 1, of the California Constitution.

Accordingly, plaintiff's pleadings allege she submitted to treatment by Yamaguchi on the representation he was to be her treating physician. Her pleadings further allege that in the course of treating plaintiff, Yamaguchi, in association with Norcal and others, gathered confidential information about plaintiff and disseminated it to unauthorized persons and for an unauthorized purpose. These allegations state a cause of action under article I, section 1, of the California Constitution.

Even though the purpose of the alleged conduct of Yamaguchi and Norcal was to defend the pending Geis lawsuit, it was not privileged under section 47, subdivision (2). In discussing the relationship between the federal constitutional right of privacy and another portion of the

section 47 privilege, Rancho La Costa, Inc. v. Superior Court (1980) 106 Cal.App.3d 646 [165 Cal.Rptr. 347] held: "Plaintiffs as private individuals are entitled to the protection of their right of privacy. That right is entitled to redress when violated. Under the mandate of the recent federal Supreme Court rulings, the right of privacy is paramount to the right of free speech when in the exercise of free speech a defendant violates another's privacy by uttering a defamatory lie about him. The right of free speech guaranteed by the state and federal Constitutions does not permit violation of the right of privacy. It most surely follows that the privilege created by Civil Code section 47(3), a statute, and thus a law of lesser organic force, cannot be expanded to permit violation of that same right of privacy. Whatever privilege is accorded defendants under Civil Code section 47(3), it must yield to the plaintiffs' constitutional rights of privacy." (Rancho La Costa, Inc. v. Superior Court, supra, 106 Cal.App.3d at p. 667; italics added.)

Likewise, in Parsons Brinckerhoff Quade & Douglas, Inc. v. Kern County Employees Retirement Assn. (1992) 5 Cal.App.4th 1264 [7 Cal.Rptr.2d 456], we said, "Where a statute operates unambiguously to deprive a person of a constitutional guarantee, it is invalid, and the courts must so declare." (at p. 1269.) (See also, Cutter v. Brownbridge (1986) 183 Cal.App.3d 836 [228 Cal.Rptr. 545].)

Similarly, the privilege created by section 47, subdivision (2) must yield to the right of privacy created by article I, section 1, of the California Constitution.

V.

WAIVER

Defendants argue that notwithstanding how we might resolve the privilege issue, plaintiff has waived any claim of wrongdoing by them because in her suit against Dr. Geis she sought a broad spectrum of damages. Her complaint against Dr. Geis n6 alleges in part: "The

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n6 Norcal asks that we take judicial notice of plaintiff's complaint against Dr. Geis. We grant that request, and consider the allegations of that complaint. (Evid. Code, @ 452, subd. (d) and 459.)

negligent diagnosis and treatment by defendants, and each of them, resulted in the plaintiff's suffering, scarring, disfigurement, mental anguish, and other unknown injuries caused by the treatment, surgery and care provided to plaintiff and as a result she suffered the injuries and damage as herein alleged." Defendants emphasize plaintiff's broad general claim against Dr. Geis for damages from "other unknown injuries."

In support of their assertion of waiver, defendants cite several California cases. However, a careful reading of those authorities reveals they are inapplicable for this reason: Plaintiff does not assert the scope of the information Yamaguchi and others obtained and disclosed went beyond the scope of the issues tendered in the Geis litigation; rather plaintiff asserts the method by which defendants obtained that information was wrongful—in violation of her constitutional right of privacy and her statutory right against unauthorized disclosure of medical information.

Britt v. Superior Court (1978) 20 Cal.3d 844 [143 Cal.Rptr. 695, 574 P.2d 766], upon which all defendants rely, arose out of the trial court's denial of plaintiffs' request for a protective order and defendant's motion to compel answers to its deposition. In order to determine whether plaintiffs had waived their privilege not to have certain information divulged, the court had to define what subjects plaintiffs had placed in issue in the litigation. Resolution of that question governed what areas defendant could explore during discovery. Plaintiffs did not allege defendant wrongfully obtained information.

In the leading case of In re Lifschutz (1970) 2 Cal.3d 415 [85 Cal.Rptr. 829, 467 P.2d 557, 44 A.L.R.3d 1], the issue arose when a psychiatrist refused to testify concerning communications with a former patient. The former patient was plaintiff in a personal injury action against a third party. What the Supreme Court resolved was whether plaintiff/patient waived his psychotherapist-patient privilege by raising certain issues in the lawsuit. The method itself by which defendant sought to obtain the information was not in dispute. Indeed, the parties were proceeding according to established discovery procedures.

Similarly, in Roberts v. Superior Court (1973) 9 Cal.3d 330 [107 Cal.Rptr. 309, 508 P.2d 309], the issue arose in a writ proceeding concerning discovery. The Supreme Court dealt with the breadth of the underlying lawsuit—whether plaintiff had opened the door to defendants' discovery of certain information that would otherwise be privileged. Again, defendants did not obtain the information in an allegedly wrongful manner, but rather sought to learn of the information in the orderly process of discovery.

We make the same distinction between this case and Torres v. Superior Court (1990) 221 Cal.App.3d 181 [270 Cal.Rptr. 401], cited by Yamaguchi, CCFMG, VPSMG and Norcal.

Therefore, we conclude that although information about plaintiff allegedly gathered by defendants may have been discoverable—even admissible—in the Geis litigation, plaintiff has not waived her causes of action based upon either the alleged wrongful methods defendants used to obtain it or their alleged wrongful disclosure of that information.

VI.

THE PROPOSED FIFTH AMENDED COMPLAINT

During the course of a motion for reconsideration brought by Yamaguchi, VPSMG and CCFMG in order to clarify certain inconsistencies in the trial court's initial ruling on the demurrers, plaintiff presented a proposed fifth amended complaint. She did so by appending it to a document entitled "Memorandum of Points and Authorities in Response to Motions for Reconsideration and Demurrers, and in Support of Plaintiff's Request to File Fifth AmendedComplaint." The court denied her request. Whether the "request" was a sufficient motion to invoke the court's discretion to allow her to file the amended pleading we need not decide. We have examined plaintiff's proposed fifth amended complaint and find nothing that, had the court allowed her to file it, would have placed her in any better stead than she will find herself when she returns to the trial court now.

CONCLUSION

The trial court correctly sustained the demurrers without leave to amend to the second, third, fourth, fifth, sixth, 10th and 11th causes of action of the fourth amended complaint.

The court erroneously sustained the demurrers without leave to amend to the seventh, eighth, ninth and 12th causes of action of the fourth amended complaint.

DISPOSITION

THE APPEALS.

The judgment of dismissal in favor of respondent Central California Faculty Medical Group, Inc. is affirmed. Costs on appeal are awarded to respondent and against appellant.

The judgments of dismissal in favor of respondents Norcal Mutual Insurance Company Herbert W. Boro, M.D., and Valley Plastic Surgeons Medical Group, Inc., are reversed. Costs on appeal are awarded to appellant and against respondents.

THE PETITION FOR WRIT OF MANDATE.

Let a writ of mandate issue directing the Superior Court of Fresno County to vacate its order of January 31, 1991, sustaining the demurrer of respondent Kent Yamaguchi, M.D., to the seventh, eighth, ninth and 12th causes of action of the fourth amended complaint and to enter a new order overruling that portion of the demurrer. Insofar as the petition seeks relief not granted above, it is denied.

Dibiaso, J., and Franson, J., n* concurred.

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n* Retired Presiding Justice of the Court of Appeal, Fifth District, sitting under assignment by the Chairperson of the Judicial Council.

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IN THE SUPREME COURT OF CALIFORNIA

DORIS HELLER, Plaintiff and Appellant, vs. NORCAL MUTUAL INSURANCE COMPANY, et al. Defendants and Respondents.	) Case No. S-034539))) (FIFTH DISTRICT COURT) OF APPEAL NOS. 5 CIVIL) F015875 AND FO16047))))) (Fresno County Superior) Court No. 405369-0)
DORIS HELLER, Petitioner, v. FRESNO COUNTY SUPERIOR COURT, Respondent.	)
NORCAL MUTUAL INSURANCE COMPANY, et al. Real Parties in Interest.	)

APPELLANT'S ANSWER BRIEF ON THE MERITS

ON REVIEW AFTER A DECISION BY THE FIFTH DISTRICT COURT OF APPEAL

STATEMENT OF THE CASE

The petitioners for review in this proceeding are the respondents NORCAL MUTUAL INSURANCE COMPANY [hereafter "NORCAL"] and KENT YAMAGUCHI, M.D. [hereafter "YAMAGUCHI"], CENTRAL CALIFORNIA FACULTY MEDICAL GROUP, INC. [hereafter "CCFMG"], and VALLEY PLASTIC SURGEONS MEDICAL GROUP, INC. [hereafter "VPSMG"]. For simplicity, the term "respondent" or "respondents" will refer to those entities, since that was their status in the original appeal/writ proceedings. The opposing party in this proceeding is the appellant/petitioner DORIS HELLER [hereafter "HELLER" or "appellant"].

On August 22, 1989, appellant DORIS HELLER filed her initial complaint in this action. (Clerk's Transcript [hereafter "CT"] 1.) Following numerous law and motion proceedings, appellant filed a second amended complaint on April 27, 1990. (CT 362.) Answers were filed by YAMAGUCHI and CCFMG, as well as by NORCAL. (CT 388, 393.) Following the filing of a demurrer by a defendant who had been served as DOE I, YAMAGUCHI and CCFMG filed a motion for judgment on the pleadings. (CT 403, 416.)

It was in that motion that the immunity of Civil Code section 47(b) was first raised in this action. (CT 421.) On September 5, 1990, Department 16 of the Fresno County Superior Court sustained the demurrer and allowed appellant 15 days to amend. (CT 534.) On or about September 10, 1990, appellant filed her third amended complaint. (CT 535.) A series of demurrers and motions followed, resulting in a ruling by Department 11 of the Fresno County Superior Court sustaining the demurrer with 20 days leave to amend. (CT 793.) On November 21, 1990, appellant filed her fourth amended complaint, which added VPSMG. (CT 805.) Demurrers by all defendants resulted in an order by Department 16 of the Fresno County Superior Court dated January 31, 1991, but apparently filed and served on or about February 8, 1991, sustaining most of the demurrers, but overruling the demurrer of YAMAGUCHI to the First Cause of Action for medical negligence. (CT 1169-1171; CT 805.)

Respondents, YAMAGUCHI, CCFMG, and VPSMG thereafter brought a motion for reconsideration seeking to have Department 16 broaden its ruling to eliminate all liability on the part of those respondents, except for the First Cause of Action against YAMAGUCHI. (CT 1207-1212.) Appellant responded by arguing that reconsideration was appropriate not only to the extent requested by the moving parties, but also as to the entire scope of the court's previous rulings. (CT 1442-1452.) In her submission, appellant included a draft of a proposed Fifth Amended Complaint, which she would file if the court would grant complete reconsideration and allow appellant leave to amend. (CT 1453-1489.)

On or about March 14, 1991, the court entered an order of dismissal as to NORCAL following the February 8, 1991, order which had sustained its demurrer without leave to amend. (CT 1169-1171; 1494-1495.) On March 14, 1991, NORCAL mailed notice of entry of judgment. (CT 1499-1502.)

The court on March 20, 1991, took the motion for reconsideration under submission. (CT 1503.) On April 8, 1991, the court granted reconsideration as requested by respondents YAMAGUCHI, CCFMG, and VPSMG, and further granted those respondents all relief they had requested. (CT 1508.) The court denied appellant's request for reconsideration of the entire matter and for leave to file a Fifth Amended Complaint. (CT 1508.) The combined effect of the court's order of April 8, 1991, and the court's previous order dated January 31, 1991, but filed and served on or about February 8, 1991, was to sustain, without leave to amend, all demurrers of all respondents to all causes of action, with the exception of the First Cause of Action for medical negligence against YAMAGUCHI. (CT 1169-1171, 1508-1511.)

On May 1, 1991, the court entered an order of dismissal as to CCFMG and VPSMG, following its previous order which had sustained demurrers to all claims against those two respondents without leave to amend. (CT 1169-1171, 1508-1512, 1532-1533.) The court's order further provided that the preparation and submission of the dismissal order by appellant's counsel should not be construed to

prejudice the right of appellant to appeal from the judgment. (CT 1533.) Thereafter, on May 1, 1991, appellant timely filed her Notice of Appeal from all judgments and appealable orders. (CT 1534-1555.)

On June 10, 1991, appellant timely filed a petition for a writ of mandate in the Fifth District Court of Appeal, seeking review of the trial court's sustaining of the demurrers without leave to amend as to all causes of action except the first as against YAMAGUCHI only. (See appellant's Petition For Writ of Mandate or Other Appropriate Relief, Fifth Appellate District, Case No. F016047.) Because of the one remaining cause of action against YAMAGUCHI, appellant could not appeal but was required to seek review by petition for an extraordinary writ. (Vasquez v. Superior Court (1971) 4 Cal.3d 800, 806-807.) The Court of Appeal, by order dated July 3, 1991, ordered the writ proceeding consolidated with the appellate proceeding. (See the Court of Appeal's order dated July 3, 1991, entered in Fifth Appellate District Actions No. F015875 and No. F016047.) The correctness of all trial court determinations relevant to this review proceeding were before the Court of Appeal via the consolidated appeal/ writ proceeding.

The Court of Appeal issued its Opinion on July 13, 1993. (Slip Opinion, p. 1.) The Court of Appeal held that the trial court erroneously sustained the demurrers without leave to amend to the Seventh, Eighth, and Ninth Causes of Action, which alleged violations of the Confidentiality of Medical Information Act, Civil Code sections 56.10 et seq.; those statutory remedies were independent of any injury appellant may have suffered by "publication of information" in the previous [hereafter "GEIS"] litigation, placing those causes of action outside the reach of Civil Code section 47(b). (Slip Opinion, pp. 18-19.) The Court of Appeal further held that the trial court erroneously sustained the demurrers without leave to amend to the Twelfth Cause of Action, which alleged a violation of appellant's right of privacy under Article I, Section 1 of the California Constitution, which prevailed over the statutory privilege of Civil Code section 47(b). (Slip Opinion, pp. 19-22.) As to the other causes of action, the Court of Appeal affirmed the trial court's ruling. (Slip Opinion, p. 26.)

Respondents NORCAL, YAMAGUCHI, CCFMG and VPSMG petitioned this Court for review; appellant DORIS HELLER opposed the petitions for review, and, in the alternative, requested review of the propriety of the Court of Appeal's determination upholding the trial court's rulings on the Second through Sixth, and Tenth and Eleventh Causes of Action. (See Petitions for Review and Answer to Petition for Review.) This Court granted review without specifying any limitations on the issues by order dated October 21, 1993.

STATEMENT OF FACTS

Appellant's Fourth Amended Complaint sought to recover against respondents NORCAL (a medical malpractice insurance carrier), YAMAGUCHI (a physician) and CCFMG and VPSMG (YAMAGUCHI's medical groups). (CT 805.) The relief was sought on a variety of theories, arising out of the alleged improper conspiracy between the insurance carrier and the physician and medical groups to violate the appellant's Constitutional right to privacy, by wrongfully obtaining and utilizing private information concerning the appellant. (CT 805-836, 1442-1489.)

Appellant, Doris Heller, was a patient of John Geis, M.D., and filed a lawsuit for professional negligence against Dr. Geis. (CT 808-809, 1458-1459.) Eventually appellant settled that lawsuit. (CT 812-813, 1461-1462.) The essence of appellant's complaint in the instant case is that the respondents entered into a conspiracy after GEIS's treatment was concluded, and acted as agents for one another, pursuant to which respondents caused YAMAGUCHI, while purporting to act as HELLER's treating physician, to secretly function as a sub rosa investigator on behalf of NORCAL. (CT 805-813, 1455-1465.)

In her Fourth and Proposed Fifth Amended Complaints, appellant asserted a first cause of action against YAMAGUCHI for post-conspiracy medical negligence. (CT 813-814, 1465-1466.) The second cause of action was against YAMAGUCHI and VPSMG for negligent infliction of emotional distress. (CT 814-816, 1466-1468.) The third cause of action was against CCFMG for negligent infliction

of emotional distress. (CT 816-817, 1468-1469.) The fourth cause of action was against NORCAL for negligent infliction of emotional distress. (CT 817-818, 1469-1470.) The fifth cause of action was against YAMAGUCHI and NORCAL for intentional infliction of emotional distress. (CT 818-819, 1470-1471.) The sixth cause of action was against NORCAL for intentional interference with a physician/patient contractual relationship. (CT 819-822, 1471-1474.) The seventh and eighth causes of action were against YAMAGUCHI and VPSMG for wrongful disclosure of confidential medical information. (CT 822-825, 1474-1477.)

The ninth cause of action was against a Dr. BORO (no longer a party) for wrongful disclosure of confidential medical information. (CT 825-826, 1477-1478.) In the proposed Fifth Amended Complaint, the Ninth Cause of Action, by virtue of its incorporation of paragraphs 1 through 24, would have included YAMAGUCHI and his medical groups. (CT 1456-1465, 1477-1478.) The tenth cause of action was against NORCAL, YAMAGUCHI, and VPSMG for unfair and/or unlawful business practices which were unlawful within the meaning of Business & Professions Code section 17200. (CT 826-829, 1479-1481.) The eleventh cause of action was against the same respondents for concealment of the existence of their conspiracy. (CT 829-831, 1481-1483.) The twelfth cause of action was against YAMAGUCHI and NORCAL for violation of appellant's constitutional right of privacy. (CT 831-832, 1483-1484.)

The demurrers and motions which challenged the Fourth Amended Complaint did not focus on contentions that the causes of action failed to allege the elements of liability; rather, the focus was on the contention that Civil Code section 47(b) furnished respondents with absolute immunity for their conduct. (CT 913-916, 923-960, 1055-1073, 1142-1166.)

The trial court eventually stated that the grounds for its decisions were that (1) the privilege of Civil Code section 47(b) barred the subject allegations; (2) there was no cause of action stated under Civil Code section 56, et seq.; (3) appellant had waived any applicable aspect of her physician/patient privilege; (4) appellant had failed to state a cause

of action premised upon a constitutional right of privacy; and (5) appellant had failed to state a cause of action under Business & Professions Code section 17200. (CT 1509.) The trial court also stated:

> The plaintiff has had ample opportunity to argue all aspects of CC §47(2). Her new contention in this regard has not been diligently placed before the Court. Nor has she noticed any type of affirmative relief re her desire to file a Fifth Amended Complaint. In the absence of any new fact, the Court relies on its January 31, 1991, determination that the subject conduct is in fact 'communicative in nature'. (CT 1510-1511.)

In paragraph 24, the Proposed Fifth Amended Complaint alleged the following non-communicative conduct: (1) Respondents wrongful acquisition, reading and photocopying of appellant's private, intimate, financial, and medical records, including records which would not have been discoverable in the GEIS lawsuit (CT 1463.);

(2) YAMAGUCHI posing as a physician, but actually acting as a sub rosa investigator for NORCAL, and gathering evidence to undermine appellant while falsely purporting to furnish medical treatment (CT 1463.); (3) NORCAL's formation of a contract with YAMAGUCHI, and payment of Yamaguchi, for such sub rosa services, and NORCAL's receipt of the wrongfully-obtained "evidence" (CT 1463-1464); (4) NORCAL's furnishing of financial incentives to YAMAGUCHI in return for the wrongful conduct (CT 1464.); (5) NORCAL's and YAMAGUCHI's physical alteration (i.e., "tailoring") of medical records concerning appellant (CT 1464.); (6) YAMAGUCHI's conduct of "medical treatment" and "referrals" not to cure appellant but rather to undermine her case against Dr. GEIS (CT 1464-1465.); (7) NORCAL's agreement to indemnify YAMAGUCHI for liability resulting from his deliberately improper medical treatment and referrals (CT 1465.); (8) NORCAL's wrongful reading and photocopying of the improperly obtained private records of appellant (CT 1465.); (9) NORCAL's failure to supervise the improper sub rosa investigation conducted by YAMAGUCHI (CT 1465.); (10) NORCAL's actual

retention and designation of appellant's treating doctor - YAMAGUCHI - as NORCAL's expert pursuant to Code of Civil Procedure section 2034 (CT 1469.). The Proposed Fifth Amended Complaint alleged that all respondents were liable, by virtue of the conspiracy and agency allegations, for the non-communicative conduct. (CT 1465.)

The Fourth Amended Complaint alleged the following non-communicative conduct: (1) NORCAL's and YAMAGUCHI's agreement to wrongfully obtain private, intimate, personal, financial, and confidential information concerning appellant without appellant's consent; (2) the conspiracy between YAMAGUCHI, and NORCAL to damage appellant's lawsuit against Dr. GEIS, through the wrongful acquisition of private information from appellant and through the wrongful creation of a tailored set of medical records, to be used to generate false testimony that Dr. GEIS' treatment was within the standard of care; (3) YAMAGUCHI's wrongful agreement with his co-defendants to use his position as appellant's treating physician to damage appellant's claim against Dr. GEIS; (4) NORCAL's payment, and furnishing of other considerations, to secure YAMAGUCHI's agreement to use his position as appellant's treating physician to damage appellant's claim against Dr. GEIS; (5) YAMAGUCHI's entry into and implementation of an agreement with NORCAL whereby YAMAGUCHI formulated and implemented a treatment plan and a psychological program not to help or cure appellant, but rather to damage appellant's claim against Dr. GEIS; (6) YAMAGUCHI's entry into an agreement with NORCAL to use his position as appellant's treating physician to testify as an expert witness for Dr. GEIS against appellant, in order to cause appellant to drop or reduce her claim. (CT 809-812.)

In the individual causes of action of the Fourth Amended Complaint, further non-communicative conduct was alleged: (1) YAMAGUCHI's use of his position as appellant's treating physician, together with his knowledge of appellant's peculiar susceptibility, to control her financial decisions in her lawsuit against Dr. GEIS, and YAMAGUCHI's agreement to testify falsely against his patient, appellant [CT 815.]; (2) CCFMG's failure to properly supervise YAMAGUCHI to prevent his unauthorized release of confidential

information about patients and CCFMG's wrongfully authorizing YAMAGUCHI's to release confidential information on appellant without her consent to NORCAL [CT 816.]; (3) NORCAL's wrongful obtaining of confidential information from YAMAGUCHI concerning appellant, and actual retaining of YAMAGUCHI - appellant's treating physician - as an expert against appellant pursuant to Code of Civil Procedure section 2034, wrongful failing to supervise the investigation of appellant, failing to comply with notice requirements of the California discovery statutes, and wrongful interference in appellant's physician/patient relationship with YAMAGUCHI [CT 817-818.]; (4) YAMAGUCHI's wrongful conduct in posing as a physician furnishing treatment for appellant's benefit, while actually functioning as a sub rosa agent for NORCAL, and wrongful control and management of appellant's medical treatment not to help or cure appellant but rather to damage her case against Dr. GEIS [CT 819-822.]; (5) YAMAGUCHI's and VPSMG's wrongful acquisition of confidential information from appellant, utilizing the device of posing as health care providers furnishing treatment to appellant [CT 822-823.]; (6) NORCAL's, YAMAGUCHI's, and VPSMG's wrongful entry into and implementation of an agreement to obtain confidential information from appellant by utilizing the false device of installing YAMAGUCHI as appellant's treating physician, when in reality YAMAGUCHI was acting as NORCAL's covert agent [CT 827-828.]; (7) YAMAGUCHI's, VPSMG's, and NORCAL's conspiracy and agreement to act as described, and further conspiracy and agreement, and implementation thereof, to prevent appellant from discovering YAMAGUCHI's true posture as NORCAL's covert agent [CT 829-831.].

The Opinion of the Court of Appeal stated:

> Plaintiff claims she suffered injury because in her litigation against Dr. Geis the defendants used information they had wrongfully obtained. (Slip Opinion, p. 17.)

Plaintiff's claim of injury, however, included her claim that she suffered emotional distress unconnected with use of information in the GEIS litigation, based upon her reaction to the betrayal inherent

in the conduct of her trusted confidant, Dr. YAMAGUCHI. Thus, appellant alleged emotional distress unconnected with the value or resolution of her claim against Dr. GEIS. (CT 815, 817-822.) For example, appellant's Fifth Cause of Action alleged that YAMAGUCHI and NORCAL intentionally inflicted emotional distress on appellant. (CT 819.) Appellant's Sixth Cause of Action alleged that she developed a profound physician/patient relationship with Dr. YAMAGUCHI and trusted him in all respects; that NORCAL knew that by hiring YAMAGUCHI to work against appellant, "this conduct could cause severe emotional distress to the patient and would destroy the relationship between the patient and physician"; and that NORCAL intended to cause appellant to suffer emotional distress. (CT 820-822.)

The information alleged in the complaint to have been wrongfully appropriated by the conspiracy of the respondents was not limited to medical information relevant to the GEIS litigation; rather, appellant alleged: (1) that NORCAL and YAMAGUCHI obtained appellant's intimate, personal, financial information [CT 809.]; (2) that YAMAGUCHI provided "other secret information which we have not been able to determine at this point in time" [CT 821.]; (3) that the information obtained included "confidential medical" as well as "other related information" [CT 822.]; (4) that YAMAGUCHI "acquired confidential and private information" concerning appellant [CT 831.]; (5) that YAMAGUCHI betrayed appellant's "Constitutional right of privacy by secretly disclosing confidential and private information and other unknown information" to NORCAL [CT 831.]. The proposed Fifth Amended Complaint alleged: (1) that the information obtained by YAMAGUCHI and NORCAL included "private, intimate, personal, financial" information [CT 1459.]; (2) that such information included "intimate, personal, financial" information and "records which would not have been discoverable in" the GEIS lawsuit [CT 1463.]; (3) that the information obtained included not merely "confidential medical" information, but also "other related information", and was obtained "in confidence" [CT 1474, 1475, 1476.]; (4) that YAMAGUCHI and NORCAL wrongfully acquired and disclosed "confidential and private information" concerning appellant [CT 1483-1484.].

Appellant's First Cause of Action against Dr. YAMAGUCHI for medical malpractice was not based on his treatment of the injury which Dr. GEIS treated; rather, the cause of action for medical malpractice (which survived demurrer and thus is not strictly at issue in this appeal) was based upon YAMAGUCHI's conspiracy with NORCAL. (CT 813-814.) The "general allegation" paragraphs incorporated in that First Cause of Action omit paragraphs 8 through 14, the paragraphs describing the treatment by Dr. GEIS (and assisting treatment by Dr. YAMAGUCHI) of appellant's physical injury. (CT 807-809, 813.) The paragraphs incorporated in the First Cause of Action are paragraphs 15 through 23, which describe only YAMAGUCHI's conduct pursuant to his conspiracy with NORCAL after the GEIS course of treatment. (CT 809-813.) The First Cause of Action limits itself to the conspiracy conduct by premising the allegations of medical negligence on YAMAGUCHI's "engaging in the foregoing acts and omissions", referring to the incorporated paragraphs 15 through 23. (CT 813-814.) Thus it is not true that YAMAGUCHI was sued for any conduct prior to his conspiracy with NORCAL.

ARGUMENT

I.
THE STANDARD OF REVIEW IS PLENARY REVIEW, AND THE ALLEGATIONS OF THE FOURTH AMENDED COMPLAINT AND THE PROPOSED FIFTH AMENDED COMPLAINT SHOULD BE EVALUATED

Questions of law are given plenary review on appeal. (Estate of Coate (1979) 98 Cal.App.3d 982, 986.) Rulings on demurrers constitute rulings on questions of law, and therefore receive plenary review on appeal. (Banerian v. O'Malley (1974) 42 Cal.App.3d 604, 611.) This Court should therefore give plenary review to the issues of whether the demurrers should have been sustained and, if so, whether it was proper to deny appellant leave to amend.

In considering those issues, this Court should analyze not only the Fourth Amended Complaint, but also the Proposed Fifth Amended Complaint. When YAMAGUCHI, CCFMG, and VPSMG filed their

motion for reconsideration, appellant responded with a request for reconsideration by the court of the entire scope of its rulings. Appellant's request, was supported by additional facts in the form of the Proposed Fifth Amended Complaint. In Rains v. Superior Court (1984) 150 Cal.App.3d 933, 944, the court held that the "different state of facts" requirement of Code of Civil Procedure section 1008 was satisfied by new allegations in an unverified proposed amended complaint.

The fact that appellant did not present her request in a formal, separately-noticed motion for reconsideration is not material. In Vertex Inv. Co. v. Schwabacher (1943) 57 Cal.App.2d 406, the court said:

> A ruling on demurrer, unlike many other types of judicial determination, may be changed for no other reason than that the judge is of the view that his first ruling was erroneous. (Citations.) Proceedings had in court, pursuant to notice given or waived, when the demurrer was first argued are the basis for the changed ruling as for the original decision, and an additional motion and notice are not required. (Id. at p. 410.)

The submission of a proposed amended complaint in such circumstances is for the purpose of "persuading [the trial court] that a valid cause could be pleaded with these new facts." (Rains v. Superior Court, supra, 150 Cal.App.3d at p. 944.) In the instant case, appellant sought to persuade the trial court that her Proposed Fifth Amended Complaint would cure the defect perceived by the trial court when it sustained the demurrers to the Fourth Amended Complaint.

The allegations in the Proposed Fifth Amended Complaint are properly before this Court on an alternate theory. Since a demurrer presents only questions of law, appellant may raise arguments for the first time on appeal even if she did not present those arguments below. (Koch v. Rodlin Enterprises (1990) 223 Cal.App.3d 1591, 1595.) Additionally, when a demurrer is sustained without leave to amend, the reviewing court may consider any tenable basis for amendment on appeal even though the theory was not presented to the trial court. (Warfield v. Peninsula Golf & County Club (1989) 214 Cal.App.3d 646, 652-653.)

II.
THE TRIAL COURT ERRONEOUSLY APPLIED THE PRIVILEGE OF CIVIL CODE SECTION 47(b) TO PURPORTED "COMMUNICATIONS" BY OR TO NORCAL, A STRANGER TO THE UNDERLYING GEIS LAWSUIT

Respondents claim the litigation communication privilege of Civil Code section 47(b) based upon the holding in Doctors Co. Ins. Services v. Superior Court (1990) 225 Cal.App.3d 1284, 1295, to the effect that an insurer providing a defense may be "treated as an authorized participant in judicial proceedings for purposes of [Civil Code section 47(b)]." (NORCAL Opening Brief on Merits, pp. 17-18 [Emphasis added.]; YAMAGUCHI Opening Brief on Merits, pp. 21-22.) Doctors Co., however, is far from settled law and in fact squarely conflicts with Bradley v. Hartford Acc. & Indem. Co. (1973) 30 Cal.App.3d 818, as well as Silberg v. Anderson (1990) 50 Cal.3d 205. The case of Kupiec v. American International Adjustment Co. (1991) 235 Cal.App.3d 1326, 1332, simply accepted the Doctors Co. holding without independent analysis in applying the privilege in favor of an insurance company.

In Bradley v. Hartford Acc. & Indem. Co., supra, 30 Cal.App.3d at 826, the court held that the Civil Code section 47(b) privilege could not be claimed by an insurance carrier furnishing a defense:

> It is also apparent that respondent Hartford was not a party to the action, nor was Ayala a party or a witness. It also stands uncontradicted that although respondent Dewberry was alleged to be an attorney at law there is a complete lack of indication that he was an attorney of record in the Wyatt action. It follows, therefore, that neither of the respondents were the designated persons (litigants, witnesses, attorneys, etc.) to whom the absolute privilege has been extended by law.

Thus, the Bradley court expressly held that an insurance carrier furnishing a defense was not an authorized participant entitled to claim

the privilege. Bradley also held, as an alternative basis for its decision, that the "interest of justice" test would be used in determining whether the communications involved were protected by the privilege. (Id. at p. 826-827.)

In Silberg v. Anderson, supra, 50 Cal.3d 205, 216-219, this Court rejected the "interest of justice test" phase of the Bradley decision. However, in so doing, this court expressly approved the alternate basis for the Bradley decision that an insurance carrier furnishing a defense is not authorized to claim the privilege:

> Actually, the Bradley court's announcement of the "interest of justice" test was wholly unnecessary to its decision. The court had already concluded that both the communicator and the communicatee were strangers to the action (neither parties, prospective witnesses nor attorneys in the action), and that the communication was not reasonably related to the action. Either of these conclusions was ample basis for holding that the communication was not privileged without resort to any "interest of justice" test. (Silberg v. Anderson, supra, 50 Cal.3d at 217; emphasis added.)

By endorsing the Bradley holding that "the communicator" was a "stranger to the action", and therefore not authorized to claim the privilege, this Court in Silberg necessarily held by implication that an insurance carrier furnishing a defense is a "stranger to the action" and therefore unauthorized to claim the litigation communication privilege of Civil Code section 47(b). Recently, Susan A. v. County of Sonoma (1991) 2 Cal.App.4th 88, 95 fn. 6 (Review denied.), correctly analyzed the implications of Silberg on the issue of whether a communicator who is not a party, prospective witness, or attorney in the action, may claim the privilege:

> Silberg disapproved Bradley to the extent it created the requirement that the communication be made to promote the interest of justice. (Citation.) In so doing, Silberg reaffirmed the validity of that part of Bradley on which we rely, i.e., that the privilege did not apply because "both

> the communicator and the communicatee were strangers to the action. . ." (Citation.) That only the communicatee in this case is a stranger to the action does not render Bradley inapplicable. The general rule regarding publications to non-participants focuses on the status of the listener rather than that of the speaker. (Susan A. v. County of Sonoma, supra, 2 Cal.App.4th at p. 95 fn. 6.)

It can therefore be seen that Bradley - Silberg - Susan A., read together, teach that communications by or to a non-party insurance carrier are not protected by the privilege of Civil Code section 47(b). In this case, even if the actionable conduct be deemed "communicative", such "communications" were between the non-party NORCAL (as "speaker" or "listener" and the YAMAGUCHI group of respondents. The above line of authority demonstrates that all such "communications" fall outside the scope of the Civil Code section 47(b) privilege because of NORCAL's status as a "stranger to the action". The Doctors Co. and Kupiec cases erroneously failed to consider the implications of this Court's discussion of Bradley in the Silberg opinion.

In addition to the logic of Bradley - Silberg - Susan A., there are very strong policy reasons for refusing to apply the privilege in cases of improper claims practices by insurance companies. Indeed, the court in Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 575-576 footnote 5, rejected in a footnote the notion that an insurance company's "alleged scheme to avoid liability under the policies" could fall within the Civil Code section 47(b) privilege merely because legal proceedings were involved. The privilege of Civil Code section 47(b) was established to protect litigants, attorneys, witnesses and court personnel in communi- cations connected with judicial proceedings. It was not intended to immunize non-party insurers from liability for fraudulent or coercive claims handling practices by providing a safe opportunity to lie, cheat, steal, and suborn perjury, merely because insurance claims frequently involve or end up in litigation.

An insurer has a mere economic interest in the subject matter of litigation against its insured. It is not a participant in the process of litigation

in the way that lawyers, witnesses, and parties are. Lawyers, witnesses and parties present testimony and legal argument in an adversarial contest of communication, through which the legal system seeks to find the truth. An insurance carrier's only interest is pecuniary, in paying for the defense of its insured and funding settlement or judgment. As a non-participant in the testimonial process of litigation, the insurance carrier has no legitimate need for the protection of the absolute privilege designed to shield litigants, attorneys, witnesses, judges and court personnel who actually participate in that testimonial process.

It is perhaps no mere coincidence that the most flagrant and egregious abuses of the privilege of Civil Code section 47(b) have been by non-party insurers. Thus, in Doctors Co., supra, the non-party insurer suborned perjury. In Kupiec, supra, the non-party insurer directed or ratified a scheme to deprive an artist of a painting he had created. Currently under review by this Court is California Dredging Co. v. Insurance Co. of North America (1993) 18 Cal.App.4th 572, review granted December 2, 1993, in which an insurance company allegedly lied about applicable policy limits.

The instant case itself is but another example of the tactics that will be refined and developed by non-party insurance companies if given a "privilege" to manipulate the legal system: conspiring with a treating physician to generate false evidence, and to obtain and use intimate, personal, financial and other private information, as well as sheer psychological pressure, to coerce a vulnerable malpractice victim into abandoning or reducing her claim. Non-party insurance companies are not before the trial court and, therefore, not subject to its sanction for unethical and/or illegal behavior. The actual participants in the system - attorneys, parties, potential witnesses and court personnel - are subject to the inherent checks on misconduct provided by the system, and perhaps pay deference to the dignity of the system. It is these authorized participants for whom the privilege was developed. Extending the privilege to a non-party insurer and its co-conspirators undermines the very policies supporting the privilege:

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> Several policies underlie the privilege. First, it affords litigants free access to the courts to secure and defend their rights without fear of harassment by later suits. Second, the courts rely on the privilege to prevent the proliferation of lawsuits after the first one is resolved. Third, the privilege facilitates critical functions of the trier of fact. (Mattco Forge, Inc. v. Arthur Young & Co. (1992) 5 Cal.App.4th 392, 402.)

III.

THE TRIAL COURT ERRED IN APPLYING THE PRIVILEGE OF CIVIL CODE SECTION 47(b) IN FAVOR OF THE YAMAGUCHI RESPONDENTS, WHO HAD BEEN HIRED BY APPELLANT AS HER HEALTH CARE PROVIDERS

In Mattco Forge, Inc. v. Arthur Young & Co. (1992) 5 Cal.App.4th 392, the court considered a case in which an expert hired by the plaintiffs was subsequently sued by the plaintiffs. The expert was an accounting firm, which was retained by plaintiffs to calculate plaintiffs' damages in connection with an underlying lawsuit. (Id. at pp. 396-397, 399.) Following the underlying litigation, plaintiffs sued the accounting firm, alleging professional malpractice, fraud, and other torts. (Id. at pp. 395-396.) The trial court granted summary judgment in favor of the accounting firm, relying in part on the litigation privilege of Civil Code section 47(b).

The Court of Appeal reversed, and the accounting firm's Petition for Review by the Supreme Court was denied. (Id. at p. 408.) The Court of Appeal first noted that Howard v. Drapkin (1990) 222 Cal.App.3d 843, and Gootee v. Lightner (1990) 224 Cal.App.3d 587, had applied the privilege in favor of neutral experts, retained by both parties in an underlying lawsuit. (Mattco Forge, Inc., supra, 5 Cal.App.4th at p. 403.) The Court of Appeal next noted that many cases had applied the privilege in favor of adverse witnesses. (Id. at pp. 404-405.) However, the court in Mattco Forge, Inc. held that the privilege would not apply in favor of a "friendly" expert witness - that

is an expert actually hired by the party who later seeks to sue the expert. (Id. at p. 405.) The court explained:

> [T]he litigation privilege does not exist to protect one's expert witnesses, but to protect adverse witnesses from suit by opposing parties after the lawsuit ends... [O]ne of the policies supporting the litigation privilege states: "[T]he law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence. . ." (Citation.) This policy can logically apply, however, only to trial testimony of adverse witnesses. The case at bench involves a pre-trial dispute between a party and its own expert witness that arose during discovery. (Id. at pp. 405-406.)

The Mattco Forge, Inc. court further reasoned:

> The analogy between a party bringing suit against its own expert witness and a party bringing a suit against its attorney has some relevance. As stated in Kimmel v. Goland (1990) 51 Cal.3d 202, 209. . ., the litigation privilege shields "litigants, attorneys and witnesses from liability. . ." Yet if it also protected an attorney from any suit by a former client, no malpractice suit could be brought. (Mattco Forge, Inc., supra, 5 Cal.App.4th at p. 406.)

The court concluded that applying the privilege to bar a plaintiff's suit against an expert witness hired by the plaintiff would not further the policies underlying Civil Code section 47(b). (Ibid.) The same reasoning dictates the same result in the instant case. Appellant was the person who hired the YAMAGUCHI respondents, and she hired them for the purpose of providing her with medical care and treatment. When they entered into that contract, they undertook obligations to appellant. They were "friendly", not "adverse", contractors. The fact that they deliberately betrayed appellant by functioning, after they had been hired by her, as covert double agents on behalf of NORCAL and by conspiring with NORCAL in complete dereliction of their duties to appellant, does not convert them into

"adverse experts" subject to protection by the litigation privilege. Just as the accountants in Mattco Forge, Inc. could be sued for violating their obligations to the persons who hired them, so can the YAMAGUCHI respondents be sued for violating their obligations to the person - appellant - who hired them as her health care providers.

IV.
THE TRIAL COURT ERRONEOUSLY APPLIED THE PRIVILEGE OF CIVIL CODE SECTION 47(b) TO NON-COMMUNICATIVE CONDUCT

The privilege of Civil Code section 47(b) protects a defendant from liability for communications made in connection with a judicial proceeding. However, that privilege does not apply to non-communicative conduct. (See Kimmel v. Goland (1990) 51 Cal.3d 202, 205, 211.) Furthermore, in an action based upon non-communicative conduct, the privilege of Civil Code section 47(b) does not bar the evidentiary use of communications to prove the underlying wrongful conduct. (See Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal.3d 1157, 1168.)

The proposed Fifth Amended Complaint has alleged the following non-communicative conduct: (1) Respondents wrongful acquisition, reading, photocopying of appellant's private, intimate, financial, and medical records, including records which would not have been discoverable in the GEIS lawsuit (CT 1463.); (2) the YAMAGUCHI respondents posing as physicians, but actually acting as sub rosa investigators for NORCAL, and gathering evidence to undermine appellant while falsely purporting to furnish medical treatment (CT 1463.); (3) NORCAL's formation of contracts with the YAMAGUCHI respondents, and payment to the YAMAGUCHI respondents, for such sub rosa services, and NORCAL's receipt of the wrongfully-obtained "evidence" (CT 1463-1464); (4) NORCAL's furnishing of financial incentives to the YAMAGUCHI respondents in return for the wrongful conduct (CT 1464.); (5) NORCAL's and YAMAGUCHI's physical alteration (i.e., "tailoring") of medical records concerning appellant (CT 1464.); (6) YAMAGUCHI's conduct of "medical treatment" and "referrals" not to cure appellant but rather

to undermine her case against Dr. GEIS (CT 1464-1465.); (7) NORCAL's agreement to indemnify YAMAGUCHI for liability resulting from his deliberately improper medical treatment and referrals (CT 1465.); (8) NORCAL's wrongful reading and photocopying of the improperly obtained private records of appellant (CT 1465.); (9) NORCAL's failure to supervise the improper sub rosa investigation conducted by YAMAGUCHI (CT 1465.); (10) NORCAL's actual retention and designation of appellant's prior treating doctor - YAMAGUCHI - as NORCAL's expert pursuant to Code of Civil Procedure section 2034 (CT 1469.).

None of the above actions constitute communications. For example, wrongfully reading illicitly-obtained medical records is not an act of communication. Similarly, failing to give a patient proper treatment for ulterior motives is not an act of communication. Similarly, operating as a sub rosa investigator while assuming the guise of a health care provider is not an act of communication. All of the foregoing are simply wrongful acts. Similar allegations of non-communicative conduct are set forth in the Fourth Amended Complaint. (CT 809-812, 815-822, 827-831.) At CT 817, the Fourth Amended Complaint, for example, alleges that NORCAL actually hired YAMAGUCHI as an expert to undermine his patient's claim, thus assisting YAMAGUCHI in acting completely contrary to his pre-existing obligations to appellant pursuant to his contractual relationship with her. (See discussion in section III., supra.)

In Kimmel v. Goland, supra, 51 Cal.3d 202, the plaintiffs had illegally tape recorded conversations with the defendants in violation of Penal Code section 632. The defendants cross-complained based upon the illegal tape recordings. The plaintiffs argued that the tapes were made for the purpose of gathering evidence in anticipation of litigation, and their conduct was protected by the privilege of Civil Code section 47(b).

The Supreme Court rejected that argument, holding that the cross-complaint alleged injury "from the taping of confidential telephone conversations, not from any 'publication' or 'broadcast' of the information contained in these conversations." (Id. at p. 209.)

The court concluded that "the litigation privilege is plainly not applicable." (Ibid.) The Supreme Court emphasized that, without exception, the privilege has only been applied to torts "arising from statements or publications." (Id. at p. 211.)

In the instant case, as in Kimmel, the appellant predicates her claim of liability on the illegal obtaining of confidential information about her. The doctors illegally obtained the information in the guise of acting as medical practitioners, when in fact they were acting as investigators for NORCAL. The insurance company illegally obtained the confidential information for use against the appellant's interests in the underlying case. As in Kimmel, the wrongful conduct was the obtaining of confidential information, not the later publication of statements concerning that information.

The foregoing observations apply equally to the other wrongful conduct of the respondents. The respondents, in effect, illegally "recorded" appellant's confidential file information. The wrongful conduct is indistinguishable from the illegal wiretapping in Kimmel. The damage suffered by appellant resulted from the illegal obtaining of intimate and personal information by hostile adversaries.

In Westlake Community Hospital v. Superior Court (1976) 17 Cal.3d 465, a hospital terminated a physician's staff privileges. The Supreme Court noted that the physician's claim was not that her injury had been occasioned by malicious statements at the proceedings, but rather that she had been injured by the malicious actions of the hospital in revoking her privileges. (Id. at p. 482.) Thus, the privilege was not applicable. In the instant case, the appellant does not claim damage because of statements made. Appellant claims damage from malicious actions, i.e., the formation of secret agreements to damage the appellant, the payment of monies from an insurance company to doctors for that purpose, the wrongful photocopying of private records, and similar acts.

The Court of Appeal in the instant case erroneously assumed that plaintiff's claimed injury was "because in her litigation against Dr. GEIS the defendants used information they had wrongfully obtained." (Slip Opinion, p. 17.) That is not, however, the injury alleged

by plaintiff. In Ribas v. Clark (1985) 38 Cal.3d 355, 365, this Court distinguished between damage caused by testimony (i.e., conveying information) and damage caused by eavesdropping (i.e., obtaining information). This Court held that eavesdropping damage accrues at the moment of the listening, so is not barred by judicial privilege.

In the instant case, appellant's damage - emotional distress and related damage - accrued from the wrongful acts of improperly obtaining private facts about her by her trusted physicians. The damage accrued whether or not those physicians, or anyone, later testified (i.e., conveyed information) concerning those facts; the damage accrued upon the betrayal inherent in the wrongful obtaining of the facts.

An illustrative case is Unruh v. Truck Insurance Exchange (1972) 7 Cal.3d 616. The defendant, while posing as the plaintiff's friend, in reality acted as a sub rosa investigator for an insurance company and took motion pictures of the plaintiff. The defendant's purpose was to undermine the plaintiff's workers' compensation claim. Upon learning of this betrayal, the plaintiff suffered a physical and mental breakdown requiring hospitalization. In a similar manner, appellant here alleges that she has suffered severe emotional distress upon learning of her betrayal at the hands of her formerly trusted physicians. Contrary to respondents' arguments, and to the apparent assumption of the Court of Appeal, it is quite conceivable that damage may accrue from the mere wrongful act of obtaining information, and the betrayal inherent in that act, whether or not the information is subsequently communicated. Indeed, the holding of Kimmel v. Goland (1990) 51 Cal.3d 202, recognizes that fact. Similarly, the physical and mental breakdown suffered by the plaintiff in Unruh was not merely due to the reduction in value of her workers' compensation claim; her emotional distress was a reaction to the betrayal of a trusted confidant - just as appellant herein suffered emotional distress from her betrayal at the hands of the YAMAGUCHI respondents.

Any communications from YAMAGUCHI to his confederates merely constitute evidence of the improper conspiracy and of YAMAGUCHI's status as a sub rosa investigator for NORCAL. The harm inflicted was YAMAGUCHI's breach of the trust reposed in him

by appellant; his communications to his co-respondents merely constitute further evidence of that breach of trust. While liability cannot be founded upon a judicial communication, it can be proved by such a communication. (See White v. Western Title Ins. Co. (1985) 40 Cal.3d 870, 888.)

The case of Doctors' Co. Ins. Services v. Superior Court (1990) 225 Cal.App.3d 1284, 1298-1300, is distinguishable. In that case, an insurance carrier was sued for suborning perjury by requesting two doctors to lie in their depositions. The court found that there was no complaint of any non-communicative conduct causing injury apart from the communication of an injurious falsehood. (Id. at p. 1299.) The court deemed all injuries to have been caused "entirely by statements made in the litigation." (Ibid.)

Moreover, the reasoning in Doctors Co. is clearly flawed. In the Doctors Co. case, when the insurance company requested the doctors to commit perjury, the insurance company was not communicating injurious falsehoods. They were instead attempting to enter into a contract to perform an illegal act, and such attempt clearly has legal significance beyond the mere utterance of words. Thus, even if the Doctors Co. case were not distinguishable, it would not constitute viable authority for sustaining the demurrers at issue.

A proper construction of the scope of the Civil Code section 47(b) immunity should limit its application to a communication intended to convey information. The privilege was designed to shield litigants from being sued later as a result of testimony or other conveyances of information during the litigation. The Doctors Co. reasoning wrongly threatens to apply the privilege to virtually any case in which words constitute tools used in the commission of a wrongful act - such as the suborning of perjury.

It is, however, well established in legal doctrine that words are not always used to convey information - sometimes the utterance of words constitutes an act of independent legal significance. Thus, in an action for breach of contract, the utterance of words establishes the elements of the contract. The words have independent legal significance, such that the hearsay rule does not render the words inadmissible.

(See, e.g., Young v. Benton (1913) 21 Cal.App. 382.) The words themselves may constitute the "operative facts", whether or not they convey information. (See Am-Cal Invest. Co. v. Sharlyn Estates, Inc. (1967) 255 Cal.App.2d 526, 541.)

Under the expansive notion of "communication" sought to be established by respondents in the instant case, an insurance company, or a litigant, could breach a settlement agreement with impunity because the tools used to build the settlement agreement were words - "communication" relating to litigation or possible litigation. Even worse, such potential wrongdoers could fraudulently enter into the settlement agreement, never intending to perform - once again, they could argue that the agreement was built with words, and thus constituted "communication" rendered privileged by Civil Code section 47(b). Based upon the fact patterns sought to be immunized in recent cases - particularly by non-party insurance companies - the foregoing scenarios can be anticipated in future cases if this Court adopts an expansive definition of "communication" protected by Civil Code section 47(b).

In Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 575-576 footnote 5, this Court rejected an attempt by an insurance company to immunize its scheme to avoid liability under an insurance policy, even though that scheme included "communication" such as testimony at a preliminary hearing by an agent of the insurance company. In White v. Western Title Ins. Co. (1985) 40 Cal.3d 870, 888, the Court found it essential "to draw a careful distinction between a cause of action based squarely on a privileged communication, such as an action for defamation, and one based upon an underlying course of conduct evidenced by the communication." (Emphasis added.) In Pacific Gas & Electric Co. v. Bear Stearns & Co. (1990) 50 Cal.3d 1118, 1132 footnote 12, the Court focused on the conveyance of information in commenting that, "while it could be argued that an exhortation to sue might be privileged, financing and otherwise promoting the litigation would not be."

In Gootee v. Lightner (1990) 224 Cal.App.3d 587, 595, the court applied the privilege because it could "discern no injury other

than that which resulted from the testimonial process. . ." Cases addressing the related question of whether conduct qualifies as "speech", such that it cannot be regulated, have inevitably focused upon the conveyance of "content" or "information" or "a message". (See, for example, In Re Joshua H. (1993) 13 Cal.App.4th 1734, 1747.

For the reasons set forth, appellant submits that the trial court in this case erroneously applied Civil Code section 47(b) to non-communicative conduct. Appellant suffered damage, including emotional distress, independent of the publication of communications in the GEIS litigation. Moreover, acts such as the entry into conspiracies do not publish information within the contemplation of the privilege of Civil Code section 47(b).

V.

EVEN IF CIVIL CODE SECTION 47(b) WERE APPLICABLE, IT WOULD BE OVERRIDDEN BY RESPONDENTS' VIOLATIONS OF APPELLANT'S CONSTITUTIONAL RIGHT OF PRIVACY

In Cutter v. Brownbridge (1986) 183 Cal.App.3d 836, a psychotherapist disclosed confidential matters concerning his patient in a lawsuit. The patient sued the psychotherapist for violating the patient's right to privacy. The trial court sustained the psychotherapist's demurrer without leave to amend, finding the disclosures privileged under the predecessor to Civil Code section 47(b).

The appellate court based its analysis on the "the close analogy between a physician-patient and a psychotherapist-patient relationship." (Id. at p. 483.) Relying on prior decisions which held that California's constitutional right of privacy protects medical information, the Cutter court concluded that details of the psychotherapists's professional relationship with his patient also fell within the zone of privacy protected by the state constitution. (Id. at pp. 842-843.) The court concluded that the constitutional right to privacy outweighed the policies underlying Civil Code section 47(b),

and held that the psychotherapist's conduct was not protected by Civil Code section 47(b). (Id. at pp. 846-848.)

The instant case is indistinguishable from Cutter as applied to disclosures by YAMAGUCHI of constitutionally-protected private information of appellant. The Cutter analysis was based upon the analogy between a psychotherapist and a physician. YAMAGUCHI, as a physician, therefore falls within the Cutter reasoning and holding. Thus, Civil Code section 47(b) does not immunize YAMAGUCHI from wrongfully disclosing confidential material. Cutter has been recognized in subsequent decisions as holding that the constitutional right to privacy outweighs the policies underlying the "judicial proceedings immunity" of Civil Code section 47(b). (See Wilkinson v. Times Mirror Corp. (1989) 215 Cal.App.3d 1034, 1042, fn. 3.)

More recently, it has squarely been held that the disclosure by a medical doctor of medical information concerning a patient is not privileged under Civil Code section 47(b). The constitutional right of privacy prevails over the privilege as to medical doctors. In Urbaniak v. Newton (1991) 226 Cal.App.3d 1128, a doctor obtained information while examining the plaintiff in connection with a workers' compensation action. Although there was no confidential physician/patient relationship as to the medical examination arranged for the benefit of the workers' compensation carrier, in the course of that examination, the plaintiff revealed his HIV positive status at a time and for a purpose that had no connection with the workers' compensation case. (Id. at p. 1135.) Thus, the plaintiff was not deemed to have waived his physician/patient privilege as to his HIV positive status, which he had elected to disclose to alert the nurse to take special precautions in handling his blood. (Ibid.) Relying on Cutter v. Brownbridge (1986) 183 Cal.App.3d 836, the court held that the constitutional right to privacy covered medical information and outweighed the policies underlying the judicial proceedings immunity of Civil Code section 47(b). (See Urbaniak v. Newton, supra, 226 Cal.App.3d 1128, 1141.)

Another recent case, ITT Telecom Products Corp. v. Dooley (1989) 214 Cal.App.3d 307, 317-320, has held that Civil Code section

47(b) will not immunize a person who discloses information in violation of a contract of confidentiality. The court refused to grant immunity under Civil Code section 47(b) to the disclosure of trade secrets in violation of a contract of confidentiality. That reasoning also supports the inapplicability of Civil Code section 47(b) in the instant case. When appellant consulted YAMAGUCHI as a physician, the doctor by virtue of his fiduciary status entered into a contract of confidentiality of no lesser sanctity than that protected by the court in ITT Telecom Products Corp. v. Dooley, supra. Disclosures by YAMAGUCHI in violation of his fiduciary relationship with his patient are not immunized under Civil Code section 47(b), for the same reasons that other disclosures in violation of other contracts of confidentiality are not immunized. (See ITT Telecom Products Corp. v. Dooley, supra, 214 Cal.App.3d at pp. 317-320.)

The mere fact that appellant filed a medical injury action against Dr. GEIS does not mean that appellant waived all of her privacy expectations concerning confidential information in the possession of YAMAGUCHI. As stated in Slagle v. Superior Court (1989) 211 Cal.App.3d 1309, 1313 a patient tenders the issue of his physical health if he files an action for personal injuries "but only as to information that relates to the claimed injuries." In the instant case, the allegations of confidential information are not limited to the specific injuries at issue in the GEIS lawsuit. In fact, it is specifically alleged that respondents obtained and used information unrelated to any issues in the GEIS litigation. (CT 817-818, 1469-1470.)

It is further specifically alleged that the respondents obtained and used appellant's private financial information - data having nothing to do with the specific injuries at issue in the GEIS lawsuit. (CT 809, 1459, 1463.) While personal and financial information may have no relevancy to the GEIS litigation - and hence not be discoverable - such information clearly would be of value to an unscrupulous insurance carrier seeking to force a plaintiff into compromising a claim for a reduced value.

In Britt v. Superior Court (1978) 20 Cal.3d 844, 862-865, and in In Re Lifschutz (1970) 2 Cal.3d 415, 430-436, our Supreme Court

held that careful balancing and evaluation is required to determine the scope of a waiver of the physician/patient privilege resulting from litigation. In both of those cases, the Supreme Court made it clear that a blanket waiver of all confidentiality does not result from the filing of a lawsuit tendering a medical condition.

Numerous cases recognize the limited character of the waiver by a patient/litigant. See, for example, Roberts v. Superior Court (1973) 9 Cal.3d 330, 340-343 (waiver form signed by patient/litigant authorizing release of "medical history, physical condition and treatment rendered" construed as limited only to reports and records regarding injuries resulting from the particular accident at issue); Hallendorf v. Superior Court (1978) 85 Cal.App.3d 553, 555-557 (plaintiff suing for personal injuries including unspecified general damages not required to disclose entire medical history); Jones v. Superior Court (1981) 119 Cal.App.3d 534, 547 (recognizing scope of waiver limited to particular injury tendered by party); Heda v. Superior Court (1990) 225 Cal.App.3d 525, 529-530 (holding defendant did not waive privacy rights by using health to change deposition and by testifying to heart problems, the court stating that waivers of Constitutional rights are not lightly found); Slagle v. Superior Court (1989) 211 Cal.App.3d 1309, 1313 (recognizing waiver only as to information which relates to the claimed injuries).

VI.

APPELLANT'S COMPLAINT ALLEGED THE ELEMENTS OF A CAUSE OF ACTION FOR BREACH OF PRIVACY; THEREFORE WAIVER AND/OR COMPETING INTERESTS MUST BE DETERMINED BY THE TRIER OF FACT

This Court's recent decision in Hill v. N.C.A.A. (January 28, 1994) 7 Cal.4th 1, 94 Daily Journal D.A.R. 1141, sets forth a detailed framework for the litigation of a cause of action based upon the violation of the Constitutional right of privacy. That case makes it clear that the "defenses" raised by respondents - waiver and the claim that appellant's privacy rights should be balanced against

respondents' desire to "informally" obtain confidential information about her - must be determined by the trier of fact. Those "defenses" cannot eliminate appellant's claim as a matter of law at the demurrer stage. This Court in Hill voiced an important concern, particularly given the stated goal of respondents to obtain and divulge privileged information without the knowledge or consent of the patient:

> If the right of privacy is to exist as more than a memory or a dream, the power of both public and private insti- tutions to collect and preserve data about individual citizens must be subject to Constitutional control. (Id. at p. 1145.)

This Court went on to hold that the California Constitution created a right of action against private entities for violation of the right to privacy. (Id. at p. 1146.) In recognizing that right of action, this Court pointed out that one of the evils addressed by the privacy provision is the misuse of information gathered for one purpose in order to serve other purposes or to embarrass. (Ibid.) Appellant's exposure of her private fears, financial problems, and similar secrets to YAMAGUCHI, for therapeutic or other reasons, should not be allowed to be misused by respondents to achieve a good settlement for Dr. GEIS.

This Court held in Hill that the elements of a cause of action for invasion of privacy are: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy. (Id. at p. 1154.) In this case, appellant has alleged a legally protected privacy interest - the confidential information entrusted to her personal physician. The facts alleged showed a reasonable expectation of privacy in the circumstances. Appellant had every right to assume that her own doctor would not divulge private information to her adversaries, in the absence of her consent or a court order (or pursuant to recognized discovery procedures [Torres v. Superior Court (1990) 221 Cal.App.3d 181, 187-188.]). Appellant alleged a serious invasion of privacy - the blatant violation of the appellant's confidential relationship with her physician to obtain unauthorized information to force her into a settlement favorable to Dr. GEIS.

Hill indicates that the issue of whether a legally recognized privacy interest is present is a question of law. (Ibid.) Unquestionably, information entrusted to one's physician is a protected area of privacy. (Id. at p. 1155.) The other two issues -whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendants' conduct constitutes a serious invasion of privacy - are mixed questions of law and fact. (Id. at p. 1154.) Evaluation of these issues - the "defenses" raised by respondents herein - must be performed by the trier of fact.

Since a blanket waiver cannot be found as a matter of law, it cannot be determined at the demurrer stage that the immunity of Civil Code section 47(b) must apply. In other words, because there are potential issues for a finder of fact concerning whether appellant waived her privacy rights, there are also potential issues concerning whether those privacy rights will prevail over the immunity of Civil Code section 47(b). If appellant has not waived her privacy rights, the case law is clear that those privacy rights will prevail over Civil Code section 47(b) and that none of the respondents will be entitled to claim immunity based upon Civil Code section 47(b). (See Cutter v. Brownbridge (1986) 183 Cal.App.3d 836, 847-848; Urbaniak v. Newton (1991) 226 Cal.App.3d 1128, 1141.)

Respondents have focused on appellant's general description of her injury in the GEIS litigation, in arguing that she waived privacy for all information conveyed to YAMAGUCHI. However, this Court has held that the scope of a partial implicit waiver of the right of privacy by bringing suit must be narrowly, rather than expansively construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by fear of exposure of private activities. (See Vinson v. Superior Court (1987) 43 Cal.3d 833, 842; Davis v. Superior Court (1992) 7 Cal.App.4th 1008, 1014.)

Respondents seek to justify the limitless right to go through the files of all treating physicians merely because a plaintiff has sued one of those physicians for medical negligence. Since respondents would be the sole judges of which medical files to inspect, respondents could secretly go through psychiatric files in a broken ankle case or

gynecological files in a sore neck case. The potential for abuse is alarming. Furthermore, under respondents' thesis, there would be no reason to limit their explorations to privileged medical files. Respondents would have the right to consult "informally" with anyone possessing privileged information concerning the plaintiff - clergymen, tax preparers and previous lawyers. The result might be an in terrorem reduction in malpractice claims, which would certainly benefit NORCAL, but would have no resemblance to justice.

The existence of a sufficient countervailing interest presents a threshold question of law for the court. (Ibid.) In the instant case, established authority holds that this "threshold question of law" should be resolved against Civil Code section 47(b). (See section V, supra.) The cases which have held that the right of privacy prevails over the litigation privilege have essentially determined that the litigation privilege is not a "sufficient countervailing interest" to warrant balancing against the Constitutional right of privacy. (See Cutter v. Brownbridge, supra; Urbaniak v. Newton, supra.) This Court has also emphasized the preference for Constitutionally protected rights over Legislative action. (See Spiritual Psychic Science Church v. City of Azusa (1985) 39 Cal.3d 501, 514.)

Assuming that question is resolved to permit the balancing requested by respondents, the relative strength of countervailing interests and the feasibility of alternatives present mixed questions of law and fact. (Hill v. N.C.A.A., supra, 94 Daily Journal D.A.R. at p. 1154.) The issue should go to the trier of fact and the cause of action should not be eliminated on demurrer.

Even if balancing were advisable in the ordinary case (by the trier of fact) respondents have foreclosed such balancing by their improper method of simply seizing information. The Court of Appeal in this case, in answer to respondents' claim of waiver, correctly pointed out that, "plaintiff asserts the method by which defendants obtained that information was wrongful - in violation of her Constitutional right of privacy and her statutory right against unauthorized disclosure of medical information." (Slip Opinion, pp. 23-24; emphasis in original.) This is not a novel concept. In Torres v. Superior Court (1990) 221

Cal.App.3d 181, 187-188, the court held that communication potentially reaching privileged matters had to be within the confines of formal discovery proceedings. In Sehlmeyer v. Department of General Services (1993) 17 Cal.App.4th 1072, 1075, the court held that an administrative subpena duces tecum issued to obtain a third party witness' personal records must be preceded by notice to the witness. That procedural requisite was required by the Constitutional right of privacy. (Id. at p. 1077.) The court in Province v. Center for Women's Health (1993) _____Cal.App.4th_____ (25 Cal.Rptr.2d 667, 674) also commented that regardless of whether the patient may have waived the physician/patient privilege, ex parte communication with the physician is not permitted.

For this reason, the fact that a subpena duces tecum eventually was issued for Dr. YAMAGUCHI's file without objection is completely irrelevant. First, obtaining file information through proper discovery channels is permissible. Appellant did not file the instant lawsuit because of a subpena duces tecum. Second, and more importantly, the mere fact that file materials were produced in response to a subpena duces tecum does not necessarily indicate the entire scope of information wrongfully obtained and used by Dr. YAMAGUCHI. Some of his intimate knowledge of appellant's weaknesses - fears, financial problems, family problems, or similar matters - may not have been present in his medical file produced in response to the subpena duces tecum.

NORCAL makes the misleading argument that the Legislature's rejection of Assembly Bill 2010 was a rejection of the concept of "prohibiting" or "limiting" informal interviews by the defense with a plaintiff's past or present treating physician. However, there would have been no need to "prohibit" or "limit" such ex parte contacts; the case authority of Torres v. Superior Court (1990) 221 Cal.App.3d 181, 187-188, already unambiguously prohibited such ex parte communications. What Assembly Bill 2010 (set forth as Exhibit "C" to NORCAL's Petition for Review) actually tried to do was permit ex parte contacts unless a party objected. Proposed new subdivision (e) to Code of Civil Procedure section 2017 would have allowed ex parte contacts upon 20 day written notice unless objected to within those 20 days by the opposing party. That provision was rejected by the Legislature, with the effect that the

party desiring the contact was required to make a motion for discovery. Thus, contrary to NORCAL's interpretation, the rejection by the Legislature of Assembly Bill 2010 reflected continuing approval of the Torres rule prohibiting ex parte contacts with physicians.

Respondents argue that the mere fact that YAMAGUCHI was, like GEIS, an insured of NORCAL, justifies the conspiracy. They seize upon the fact that one of the causes of action asserted against YAMAGUCHI was for professional malpractice, suggesting that YAMAGUCHI conferred with NORCAL out of concern for his own exposure and that he was justified in doing so because he was sued for professional malpractice in the treatment of the plaintiff. That scenario is belied by the record.

First, the medical malpractice cause of action against YAMAGUCHI is not based upon his pre-conspiracy treatment of appellant. That cause of action incorporates paragraphs 1 through 7 and 15 through 23 of the general allegations of the Fourth Amended Complaint. (CT 813.) The cause of action omits paragraphs 10 through 14, which set forth YAMAGUCHI's pre-conspiracy participation in the treatment of appellant, including YAMAGUCHI's performance of an amputation of appellant's left third digit (CT 808.) The paragraphs which are incorporated in the First Cause of Action include only YAMAGUCHI's post-conspiracy management of appellant's treatment for the improper purpose of reducing appellant's claim against GEIS, and not of helping or curing appellant. (CT 809-813.) Thus, the cause of action for medical malpractice - omitting the allegations of YAMAGUCHI's pre-conspiracy conduct but including the allegations of YAMAGUCHI's post-conspiracy conduct - was clearly not based on any actions of YAMAGUCHI which preceded his violation of his patient's right of privacy.

Second, YAMAGUCHI's own Petition for Review in this action, like his appellate briefs before the Fifth District Court of Appeal, does not even assert that his communications with NORCAL were generated by his fear of being sued by appellant. It was only NORCAL which developed that theory, and that theory is nothing more than a fiction. Finally, even if YAMAGUCHI were afraid of being sued, he

would still be without authority to violate his patient's Constitutional and statutory rights to privacy of medical information in the absence of a release signed by the patient or the institution of formal discovery proceedings.

Respondents seek the unfettered right to ignore statutory privileges in the case of malpractice plaintiffs by observing that the plaintiffs may speak informally with their own physicians. Respondents characterize their conduct as "informal discovery". However, there is no such thing as "informal discovery". Permissible methods of discovery are defined in Code of Civil Procedure section 2019. Respondents seek a carte blanche to investigate intrusively into all aspects of a plaintiff's private life, without having to go through normal discovery procedures. Normal discovery procedures, however, are essential to permit the court to balance Constitutional privacy interests against the interests of litigants in obtaining information.

Suggestions by respondents of unfairness to physicians and their insurance carriers are without merit. Respondents themselves receive many protections via privileges of their own. There are many situations in which plaintiffs in medical malpractice litigation are precluded from obtaining information available to defendant physicians. State and federal law, for example, reflect a policy of excluding evidence of peer review of a physician in a case of alleged medical malpractice.

Thus, Evidence Code section 1157 precludes discovery of peer review materials. Business & Professions Code section 800(c) provides for confidentiality of information relating to a physician's licensing file, which might contain matters reported through peer review. On the national level, Congress enacted the Health Care Quality Improvement Act, 42 U.S.C. sections 11101 et seq., to provide immunity for peer review participants from liability, where certain requirements are fulfilled.

Respondents have invoked out-of-state case authority and have sought to equate their claim of statutory immunity under Civil Code section 47(b) to the Constitutional right to petition the government for redress of grievances. As earlier discussed, however, Hill v. N.C.A.A.

is controlling and prescribes the method in this state for balancing countervailing interests.

VII.

THE FOURTH AMENDED COMPLAINT AND THE PROPOSED FIFTH AMENDED COMPLAINT STATE CLAIMS FOR VIOLATION OF CIVIL CODE SECTION 56.10 WHICH PREVAIL OVER ANY ALLEGED IMMUNITY UNDER CIVIL CODE SECTION 47(b)

Civil Code section 56.10 provides that no provider of health care shall disclose medical information regarding a patient without first obtaining an authorization, except as provided in subdivision (b) or (c). The complaints at issue contain allegations of unauthorized disclosures. Furthermore, the allegations of conspiracy would make NORCAL, in addition to the health care providers, liable for the conspiracy to violate Civil Code section 56.10.

The only conceivable exception which might apply in the instant case, and the only exception asserted by respondents, is that included in Civil Code section 56.10(c)(4):

> The information may be disclosed to organized committees or agents of professional societies or of medical staffs of licensed hospitals, . . . or to utilization and quality control in peer review organizations . . ., or to persons or organizations insuring, responsible for, or defending professional liability which a provider may incur, if the committees, agents, plans, organizations, or persons engaged in reviewing the confidence or qualifications of health care professionals or in reviewing health care services with respect to medical necessity, level of care, quality of care, or justification of charges.

A careful reading of that subdivision indicates that a physician may disclose information in connection with peer review, or to persons

"defending professional liability which a provider may incur." The "professional liability" reference obviously contemplates the provider's own professional liability. The section would not permit non-party YAMAGUCHI to voluntarily disclose, without his patient's authorization, confidential information concerning his patient to the insurer defending Dr. GEIS.

Civil Code section 56.10(c)(4) is also irrelevant because it only applies when the organizations or persons receiving the information "are engaged in reviewing the competence or qualifications of health care professionals or in reviewing health care services with respect to medical necessity, level of care, quality of care, or justification of charges." Furthermore, the respondents have assumed, without justification, that any provider may furnish information concerning any other provider, when the statutory exception was designed for professional review of the same provider. Thus, the information may not be disclosed for the mere purpose of helping a doctor put together a good defense in the underlying lawsuit.

Civil Code section 56.10 is a very specific statute dealing with disclosure of medical information. As such, it prevails over the general statute Civil Code section 47(b):

> It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment. (See People v. Gilbert (1969) 1 Cal.3d 475, 479.)

For this reason, case law has consistently held that physicians may only make unauthorized disclosures of medical information in connection with litigation when those disclosures are compelled through the proper use of discovery. That rule clearly indicates that Civil Code section 56.10 prevails over Civil Code section 47(b). Otherwise, there would be no need to address the question whether the disclosures were compelled by discovery or simply volunteered.

In Inabnit v. Berkson (1988) 199 Cal.App.3d 1230, 1239, the court concluded that a release of information by a physician which had been compelled by proper discovery procedures would not constitute a breach by the physician of his duty to his patient. It follows from that reasoning that unauthorized disclosures by a physician which have not been compelled via proper discovery procedures will constitute breaches of duties owed to patients. To the same effect is Torres v. Superior Court (1990) 221 Cal.App.3d 181, 187-188, wherein the court granted a petition prohibiting further ex parte communication between a physician and the patient's adversaries.

Civil Code sections 56.35 and 56.36 provide remedies for violations of Civil Code section 56.10 et seq. Therefore, by basing her claims upon that act and its remedies, the plaintiff has stated viable causes of action squarely within the holdings of Kimmel v. Goland (1990) 51 Cal.3d 202, 212, and Ribas v. Clark (1985) 38 Cal.3d 355, 364-365.

Because the statute provides for an immediate remedy, the plaintiff's right of recovery accrued immediately upon the violation of Civil Code section 56.10, and did not depend upon the subsequent use of the information involved in a judicial proceeding. Therefore, the bar of Civil Code section 47(b) does not reach the cause of action predicated on the statutory violation. Stated differently, the causes of action based on the remedies provided by the Confidentiality of Medical Information Act set forth claims independent of any injury plaintiff may have suffered by use of the information in the GEIS litigation.

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CONCLUSION

For the reasons stated, appellant respectfully requests that the judgments and orders of the trial court raised by this appeal/writ proceeding be reversed. All demurrers should have been overruled at the trial court level, or, alternatively, leave to amend should have been granted. Appellant further requests all other appropriate relief.

Dated: February 18, 1994. TRITT & TRITT

By: _____
James F. Tritt, Attorneys
for Appellant DORIS HELLER

In Association with

ROGER K. VEHRS

By: _____
Roger K. Vehrs, Attorneys
for Appellant, DORIS HELLER

By: _____
Thornton Davidson, Attorneys
for Appellant, DORIS HELLER

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FEDERAL REGISTER

VOL. 58, No. 167

Notices

DEPARTMENT OF STATE

[Public Notice 1853]

DATE: Tuesday, August 31, 1993

ACTION: Notice.

SUMMARY: On September 8, 1992, the United States became a party to the International Covenant on Civil and Political Rights, joining over 117 other nations in asserting its dedication to preserving and promoting human rights. The Covenant guarantees to all individuals within the territory and subject to the jurisdiction of the State Party a broad spectrum of civil and political rights, rooted in basic democratic values and freedoms. The Covenant obligates each State Party to respect and ensure these rights, to adopt any necessary legislative or other measures to give effect to these rights, and to provide an effective remedy to those whose rights are violated. The Covenant also establishes a Human Rights Committee to oversee compliance and investigate reports of noncompliance made by one Party against another. The text of the Covenant, as well as the reservations, understandings and declarations upon which U.S. adherence is based, are set forth below. FOR FURTHER INFORMATION CONTACT: David P. Stewart, Assistant Legal Adviser for Human Rights and Refugees, Department of State, 2201 C St. NW., Washington, DC 20520-6310, 202-647-9328.

SUPPLEMENTARY INFORMATION: The text of the Covenant on Civil and Political Rights is as follows:

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the idea of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved in conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedom,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

Part I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived for its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, is conformity with the provisions of the Charter of the United Nations.

Part II

Article 2

1. Each State Party of the present Covenant undertakes to respect to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, within distinction of any kind, such as race, color, sex language, religion, political or other opinion national or social origin, property, birth or other status.

2. Where no already provided for by existing legislative or other measures, each State Party to present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Part III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide,it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labor;

(b) Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labor may be imposed as a punishment for a crime, the performance of hard labor in pursuance of a sentence to such punishment by a competent court;

(c) For purposes of this paragraph, the term "forced or compulsory labor" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, as the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or where the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

(e) To examine, or to have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such a conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed. If, subsequent to the commission of the offense, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually

or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labor Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and [*45938] shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Part IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall covene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Twelve members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:

(a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party

claims that another State Party is not fulfilling its obligations under the present Covenant.

Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if its concerns a state Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent to the communication an explanation or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged; (d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present

Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts, the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1. (a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

Part V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

Part VI

Article 48

1. The present Covenant is open for signature by any State member of the United Nations or member of any of its specialized agencies, by any State party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with request that they notify him whether they favor a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favors such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States parties which have accepted them, other States Parties still being bound by the provision of the present Covenant and any earlier amendment which they have accepted.

Article 52

Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:
(a) Signatures, ratifications and accessions under article 48;

(b) The date of entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

United States Reservations, Understandings and Declarations

The Senate gave its advice and consent to the ratification of the international Covenant on Civil and Political Rights, and the United States became party to the Covenant on September 8, 1992, subject to a number of reservations, understandings and declarations. The text of the Senate's resolution of advice and consent, as adopted on April 2, 1992, 138 Cong. Rec.

S 4781-84 (daily ed. Apr. 2, 1992) is as follows:

I. The Senate's advice and consent is subject to the following reservations:

(1) That Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

(2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

(3) That the United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.

(4) That because U.S. law generally applies to an offender the penalty in force at the time the offense was committed, the United States does not adhere to the third clause of paragraph 1 of Article 15.

(5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of Article 10 and paragraph 4 of Article 14. The United States further reserves to these provisions with respect to individuals who volunteer for military service prior to age 18.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Covenant:

(1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status-as those terms are used in Article 2, paragraph 1 and Article 26-to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further

understands the prohibition in paragraph 1 of Article 4 upon discrimination, in time of public emergency, based "solely" on the status of race, color, sex, language, religion or social origin not to bar distinctions that may have a disproportionate effect upon persons of a particular status.

(2) That the United States understands the right to compensation referred to in Articles 9(5) and 14(6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law.

(3) That the United States understands the reference to "exceptional circumstances" in paragraph 2(a) of Article 10 to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons. The United States further understands that paragraph 3 of Article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system.

(4) That the United States understands that subparagraphs 3(b) and (d) of Article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed. The United States further understands that paragraph 3(e) does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defense. The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause.

(5) That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.

III. The Senate's advice and Consent is subject to the following declarations:

(1) That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.

(2) That is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, Article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to Article 19, paragraph 3, which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations.

(3) That the United States declares that it accepts the competence of the Human Rights Committee to receive and consider communications under Article 41 in which a State Party claims that another State Party is not fulfilling its obligations under the Covenant.

(4) That the United States declares that the right referred to in Article 47 may be exercised only in accordance with international law.

IV. The Senate's advice and consent is subject to the following proviso:

Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

Dated: August 19, 1993.

David P. Stewart,

Assistant Legal Adviser for Human Rights and Refugees, Department of State.

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INSURANCE CODE

Cal Ins Code @ 11890 (1994)

@ 11890. (Operative until December 31, 1994) Market assistance program

(a) If the commissioner finds after a public hearing that liability insurance for a designated class of risk is not readily available in the voluntary insurance market, and that the public interest requires this availability, the commissioner may authorize the formation of a market assistance program to assist in securing that insurance for those risks in the designated class. The commissioner may require insurers, agents, and brokers to attend public hearings and meetings concerning either the need for a market assistance program or the organization and formation of a program. The commissioner also may assist in securing insurance for risks in the designated class for which commercial liability insurance is not readily available in forming a risk pooling arrangement as permitted by the Federal Liability Risk Retention Act of 1986.

(b) The commissioner shall formulate a market assistance program giving consideration to the need for adequate and readily accessible coverage, to the needs of insureds, insurers, agents, and brokers, to the need for reasonable underwriting standards and required loss prevention measures, and to the need for minimum interference with the operation of the voluntary market. The commissioner may require insurers, agents, and brokers to assist in the formation and implementation of the market assistance program.

(c) A market assistance program shall be comprised of insurers, agents, and brokers and their participation shall be voluntary. The commissioner shall not permit an insurer to condition its participation in such a way as to be inequitable to the other insurer participants.

(d) Market assistance programs shall not be established for the following types of insurance: professional liability insurance as defined in subdivision (b) of Section 11589, pollution liability, workers' compensation and employers' liability, product liability, ocean marine, reinsurance, any insurance defined in Section 660 or 675 unless coverage is provided by a separate rider or endorsement for an activity for which the insured receives compensation, a stipend, or remuneration of any kind for the activity and then only to the extent of the coverage, insurance available through an involuntary market mechanism, including, but not limited to, the California Automobile Assigned Risk Plan and the California Fair Plan Association, or that form of risk covered under the provisions of Public Law 97-45 (15 U.S.C. Sec. 3901 et seq.) as enacted September 25, 1981.

(e) Any plan formulated pursuant to this section shall give consideration to the need for adequate and readily accessible coverage, to alternative methods for improving the market affected, to the inherent limitations of the insurance mechanism, to the need for reasonable underwriting standards, and to the requirement of reasonable loss prevention measures.

(f) Any plan formulated pursuant to this section shall establish procedures that will create minimum interference with the voluntary market.

(g) Voluntary plans shall be submitted to the commissioner and, if approved, may be put into operation. For the purpose of this section, liability insurance for a designated class of risk is not readily available in the voluntary insurance market, when either there is a significant decrease in the number of insurers writing that class of risk, or there is a total withdrawal by insurers from writing that class of risk.

Cal Ins Code @ 11891 (1994)

@ 11891. (Operative until December 31, 1994) Temporary joint underwriting association for liability insurance

(a) If, after a public hearing, the commissioner determines that a market assistance program has failed to provide adequate liability insurance coverage, the commissioner ma yorder the creation of an unincorporated, not-for-profit, temporary joint under writing association for liability insurance, constituting a legal entity separate and distinct from all its members. Every insurer authorized to write and engaged in writing within this tate, on a direct basis, liability insurance, including the liability portion of multiperil policies, but not including (1) ocean marine insurance (2) professional liability insurance as defined in subdivision (b) of Section 11589 or, (3) any insurance defined in Section 660 or 675 except to the extent that commercial liability coverage is provided by a separate rider or endorsement to the policy and a separate premium is charged for the coverage, shall be a member of the association and shall remain a member as a condition of its authority to continue to transact insurance in this state. The association shall not issue policies covering professional liability insurance as defined in subdivision (b) of Section 11589, workers' compensation and employer's liability, pollution liability, product liability, ocean marine, reinsurance, any insurance defined by Section 660 or 675 unless coverage is provided by a separate rider or endorsement for an activity for which the insured receives compensation, a stipend, or remuneration of any kind for the activity and then only to the extent of the coverage, or liability coverages available through the California Automobile Assigned Risk Plan or the California Fair Plan Association.

(b) The purpose of the association is to provide a market for liability insurance on a self-supporting basis without subsidy from association members. If the commissioner determines after public hearing that liability insurance for a designated type of risk is readily available through the coluntary market, the association shall cease its underwriting operations. In no event shall the association continue past one year from the date of its creation unless the commissioner has determined, ater public hearing, the necessity for its continued existence. If the association continues in existance past one yar, the commissioner shall conduct those hearings at least annually.

(c) The commissioner may hold a public hearing to determine the effectiveness of any market assistance program already in existence on January 1, 1988, in order to determine if the market assistance program has provided adequate liability insurance coverage. Based upon that determination, the commissioner may order the creation ofa Joint Underwriting Association pursuant to subdivision (a) without requiring further participation in a market assistance program.

Cal Ins Code @ 11892 (1994)

@11892. (Operative until December 31, 1994) Powers of association

The association on behalf of its members, may exercise directly, or perform by contractual delegation, all of the following:

(a) Issue or cause to be issued policies of liability insurance applicants, including incidential coverage, subject to limits as specified in the plan.

(b) Underwrite the insurance or appoint service companies to perform those functions.

(c) Obtain reinsurance.

(d) Cede insurance.

(e) Provide for reinsurance of risks incurred by the plan, and enter in reinsurance agreements with insurers to establish a reinsurance plan for risks of coverage described in the plan.

(f) Receive, reinvest, and disburse funds.

(g) Open bank accounts and delegate authority for deposit, withdrawal, and disbursement of funds.

(h) Borrow funds for the association's necessary administrative expenses.

(i) Provide for fidelity and surety bonds as may be deemed necessary to transact the business of the association.

(j) Review, consider, and act on any matters necessary and proper for the administration of the association.

(k) Develop, promulgate, and effectuate loss preventon programs.

(l) Sue and be sued; provided, however, that no judgment against the association shall create any liability in the individual memember companies, and that the association may provide for the indemnification of its member companies, members of the board of directors and officers and employees and other persons acting on behalf of the association.

Cal Ins Code @ 11893 (1994)

@ 11893. (Operative until December 31, 1994) Vesting of administrative powers in board of directors

The administrative powers of the association shall be vested in a board of directors, appointed by the commissioner, consisting of eight members and shall include six members who have experience in the insurance field and two public members who shall serve terms as established by the plan.

Cal Ins Code @ 11894 (1994)

@ 11894. (Operative until December 31, 1994) Assessment of fee

The association may assess each member an initial fee sufficient to insure the issuance of liability policies. The initial fee shall be reimbursed to each member at such time as deemed prudent by the association.

Cal Ins Code @ 11895 (1994)

@ 11895. (Operative until December 31, 1994) Submission of proposed plan of operation; Advisory committee; Approval of commissioner; Amendments

(a) Within 45 days following creation of the association as provided in Section 11891, the directors of the association shall submit to the commissioner for review a proposed plan of operation. The plan of operation shall provide for economic, fair, and nondiscriminatory administration and for the availability of liability insurance for designated types of risk. The plan shall contain provisions including, but not limited to, establishment of necessary facilities, management of the association, commission arrangements, reasonable and objective underwriting standards, cession of reinsurance, appointment of servicing carriers or other servicing arrangements, and procedures for determining amounts of insurance to be provided by the association.

(b) For any class of liability insurance designated to participate in the Joint Underwriting Association, the commissioner shall appoint an advisory committee composed of representatives from the designated class, which shall, within 10 days from receipt of the plan, re

view the proposed plan of operation and communicate in writing to the commissioner, for his or her consideration, any omissions or deficiencies in the plan.

(c) The plan of operation shall be subject to approval of the commissioner after consultation with members of the association and other affected individuals and organizations. If the commissioner disapproves all or any part of the proposed plan of operation, the directors of the association, within 15-working days, shall submit for review an appropriate revised plan of operation or part thereof. If the directors fail to do so, the commissioner shall promulgate a plan of operation or part thereof, whichever is appropriate. The plan of operation approved or promulgated by the commissioner shall become effective and operational on order of the commissioner.

(d) Amendments to the plan of operation may be made by the directors of the association, subject to the prior written approval of the commissioner.

Cal Ins Code @ 11896 (1994)

@ 11896. (Operative until December 31, 1994) Policies issued by association; Offer to issue rider or indorsement; Cancellation of policies; Rates

(a) All policies issued by the association shall be on a claims-made basis.

(b) All policies issued by the association shall contain a provision which guarantees the insured that the association shall issue, on the written demand of any insured to whom it has issued a claims-made policy, a rider or endorsement to the policy providing coverage for a period not less than the term of the underlying association claims-made policy, for any acts or omissions by the insured which occurred

during the same period covered by the association's claims-made policy, but excluding liability for any claim for injury or loss made to the association for which an adequate premium is charged pursuant to subdivision (d). The association shall discharge its obligation under this subdivision by offering to issue a rider or endorsement for a single term beyond the policy period of the underlying association claims-made policy.

(c) Cancellation of the association's policies shall be governed by the applicable provisions of this code for the particular type of liability coverage.

(d) All rates, rating plans, rating rules, rating classification and territories applicable to the liability insurance written by the association and statistics relating thereto shall be subject to the provisions of Chapter 9 (commencing with Section 1850) of Part 2 of Division 1. Due consideration shall be given to past and prospective loss and expense experience for the liability insurance provided, trends in the frequency and severity of losses, the investment income of the association, and any other information as the commissioner may require. All rates shall be on an actuarially sound basis and shall be calculated to be self-supporting.

Cal Ins Code @ 11897 (1994)

@ 11897. (Operative until December 31, 1994) Certification of inability to pay outstanding obligations; Schedule of surcharges; Termination of underwriting activities; Recoupment of assessments

(a) Upon a determination that within the next 180 days thereafter, the association willbe unable to pay its outstanding lawful obligations as they mature in the regular course of business, as shown by an excess of lawful obligations over admitted assets, the association shall certify to the commissioner the existence of that condition.

(b) At the time of certification, the association shall first submit a schedule of policyholder surcharges which shall be sufficient to assure the continued sound financial operation of the association. The schedule of policyholder surcharges shall become final within 30 days after certification unless the commissioner finds that the amounts of the surcharges are unreasonable. The policyholder surcharge shall not exceed 25 percent of the total premium paid for a policy or policies obtained through the association. Upon determination by the association that the policyholder surcharge is insufficient to assure the association's continued sound financial operation, the association shall submit a schedule of insurer-member assessments. Insurer-member assessments shall become final within 30 days unless the commissioner finds that the amounts of the assessments are unreasonable. The insurer-member assessments shall not exceed 1 percent of each insurer-member's direct written premium in this state attributable to that insurance, the writing of which requires it to be a member of the association as set forth in subdivision (a) of Section 11891.

(c)

(1) Upon termination of underwriting activities of the association, any person who obtained insurance through the association and who was subject to payment of a surcharge, shall recoup a proportional share of that surcharge from the excess of assets over liabilities, which shall include all necessary administrative expenses, losses, and loss adjustment expenses and reserves, and reserves for losses incurred but not reported together with loss adjustment expenses attributable to them.

(2) If, upon termination of the underwriting activities of the association, the board of directors of the association certifies to the commissioner a deficit of assets over liabilities as defined in paragraph (1), the commissioner shall, within 60 days of that certification, authorize the association to begin recoupment of the deficit by applying a surcharge determined by the association at a rate not to exceed 2 percent of the annual premiums on future policies of that insurance, the writing of which requires the insurer to be a member of the association as set forth in subdivision (a) of Section 11891.

(d) Each insurer-member shall recoup over a reasonable length of time a sum reasonably calculated to recoup the assessments paid by the insurer-member by way of a surcharge on premimums under subdivision (c). Amounts recouped shall not be considered premiums for any other purpose, including the computation of gross premium tax or agent's commission. The amount of the surcharge shall be separately stated on either a billing or policy declaration sent to the insured. An insurer-member may omit collection of recoupment amounts from the insured when the expense of collection would exceed the amount collected. However, nothing shall relieve the insurer-member of its obligation to recoup amounts otherwise collectible.

Cal Ins Code @ 11898 (1994)

@ 11898. (Operative until December 31, 1994) Issuance of liability insurance policy

If the association determines that an appliciant meets the underwriting standards of the association as prescribed in the plan, the association, upon receipt of the premium or the portion of the premium as prescribed in the plan, shall cause a policy of liability insurance to be issued.

Cal Ins Code @ 11899 (1994)

@ 11899. (Operative until December 31, 1994) Appeal

An applicant to the association, any person insured pursuant to this chapter, or their representatives, or any affected insurer, may appeal to the commissioner within 30 days after any ruling, action, or decision by, or on behalf of the association, with respect to those items the plan of operation define as matters which may be appealed.

Cal Ins Code @ 11900 (1994)

@ 11900. (Operative until December 31, 1994) Judicial review of commissioner's orders

All orders of the commissioner made pursuant to this chapter shall be subject to judicial review. However, notwithstanding any other provision of law, proceedings for review shall not act as a stay of the enforcement of any order or decision of the commissioner disapproving or ordering the withdrawal, adjustment, or termination of the effectiveness of any rate filing made by or on behalf of the association on the ground that the rates or premiums for the business of the association are unreasonable or excessive.

Cal Ins Code @ 11901 (1994)

@ 11901. (Operative until December 31, 1994) Filing of statement with commissioner

Annually, on or before March 1, the association shall file in the office of the commissioner a statement which contains information with respect to its transactions, condition, operations, and affairs during the preceding calendar year. The statement shall contain those matters and information as are prescribed and shall be in a form approved by the commissioner. The additional information with respect to its transactions, condition, or any matter connected with its transactions and condition considered to be material and of assistance in evaluating the scope, operation, and experience of the association.

Cal Ins Code @ 11902 (1994)

@ 11902. (Operative until December 31, 1994) Examination of affairs of association

The commissioner shall make an examination of the affairs of the association at least annually and at any other time the commissioner deems advisable. The examination shall be conducted and the report thereon filed in the manner prescribed in Article 4 (commencing with Section 730) of Chapter 1 of Part 2 of Division 1. The expenses of the examination shall be borne and paid by the association.

Cal Ins Code @ 11903 (1994)

@ 11903. (Operative until December 31, 1994) Liability of association, members, or commissioner

There is no liability on the part of and no cause of action of any nature shall arise against, the association or its members, the commissioner or his or her authorized representatives or any other person or organization, for any statements, acts, or omissions made in good faith by them during any proceedings or concerning any matters within the scope of this chapter.

Cal Ins Code @ 11904 (1994)

@ 11904. (Operative until December 31, 1994) Dissolution of association

Dissolution of the association, including its assets and liabilities, shall be accomplished under the supervision of the commissioner.

Cal Ins Code @ 11905 (1994)

@ 11905. (Operative until December 31, 1994) Membership in California Insurance Guarantee Association

The association shall not be a member of the California Insurance Guarantee Association, nor shall that association be otherwise responsible for losses sustained by the association.

Cal Ins Code @ 11906 (1994)

@ 11906. (Operative until December 31, 1994) Repeal of chapter

This chapter shall remain in effect only until December 31, 1994, and as of that date is repealed, unless a later enacted statute, which is enacted before December 31, 1994 deletes or extends that date.

Supreme Court, U.S.
FILED
NOV 18 1994
OFFICE OF THE CLERK

No. 94-822

In The

Supreme Court of the United States

October Term, 1994

DORIS HELLER,

Petitioner,

v.

NORCAL MUTUAL INSURANCE COMPANY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The California Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S WRIT OF CERTIORARI

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I.

RESPONDENT YAMAGUCHI'S STATEMENT OF THE CASE

Mindful of the admonition in Supreme Court Rule 15.1 and request for brevity in Rule 15.3, Respondent Kent Yamaguchi, M.D. offers a brief correction and supplementation to Petitioner's Statement of the Case.

A. Relationship of the Parties.

Respondent Yamaguchi is a medical doctor licensed by the State of California and insured for professional liability by Respondent Norcal Mutual Insurance Company. In 1987, Dr. John Geis admitted Petitioner to Sierra Hospital to remove a bone spur from her left hand. Thereafter, she developed a staphylococcal infection, which Dr. Geis diagnosed and treated, and subsequently amputated Petitioner's third finger on her left hand with Respondent Yamaguchi's assistance. Petitioner dismissed Dr. Geis as her treating physician but continued to treat with Respondent Yamaguchi.

B. The Underlying Lawsuit.

Petitioner sued Dr. Geis for alleged medical malpractice arising from his course and treatment of Petitioner. Petitioner did not name Yamaguchi as a party to the underlying action, but the attorney representing Dr. Geis consulted with Yamaguchi to provide expert testimony. In

deposition, Yamaguchi testified he had met with a representative of Respondent Norcal as well as Dr. Geis' attorney to discuss Petitioner's condition and prognosis. (Appendix – California Supreme Court Opinion, p. 4a.)

C. Procedural History of the Present Action.

Based on the facts set forth above, Petitioner filed her complaint against Respondents, among others. As Petitioner notes, Respondents demurred to Petitioner's Fourth Amended Complaint,[1] and the trial court sustained Respondents' demurrers' without leave to amend against all but the negligence cause of action against Respondent Yamaguchi (which was not the subject of demurrer). (Appendix – California Supreme Court Opinion, p. 5a.)

The California Fifth District Court of Appeal reversed the trial court's order sustaining the demurrers without leave to amend the cause of action for wrongful disclosure of confidential medical information and the cause of action for violation of constitutional right to privacy. (Appendix – California Court of Appeals Fifth District Opinion, p. 65a.)

The California Supreme Court reversed the Court of Appeal's judgment on the claims for wrongful disclosure

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[1] Respondent Yamaguchi, having answered Petitioner's complaint, moved for judgment on the pleadings, the procedural effect of which is identical to demurrer. (Appendix – California Court of Appeals Fifth District Opinion, p. 47a.)

of confidential medical information and violation of constitutional right of privacy, and affirmed the court's decision in all other respects. (Appendix – California Supreme Court Opinion, p. 16a.)

Petitioner now seeks a Writ of Certiorari, allegedly on the basis her claim for violation of right of privacy included her federal constitutional right of privacy applicable to the states through the Fourteenth Amendment and the privacy provisions of the International Covenant on Civil and Political Rights (hereafter "the ICCPR"). As discussed *infra*, Petitioner failed to raise either claim in any of the lower court proceedings, and her Petition for Writ of Certiorari should be dismissed accordingly.

II.

SUMMARY OF THE ARGUMENT

In her Petition for Writ of Certiorari, Petitioner alleges for the first time the "constitutional rights of privacy" Respondents allegedly violated include both her federal constitutional right of privacy and the right of privacy embodied in the ICCPR. However, both the California Fifth District Court of Appeal and the California Supreme Court only considered and ruled on whether she stated a claim based on her California state constitutional right of privacy, and did not consider or rule on whether her rights of privacy embodied in the Fourteenth Amendment and/or the ICCPR had been violated.

Additionally, Petitioner never challenged the constitutionality of California Civil Code section 56.10(c)(4) in

the lower courts, but, rather, attempted to plead a violation of the Confidentiality of Medical Information Act to which section 56.10(c)(4) would not be an exception. (See Petition for Writ of Certiorari, pp. 11-12.)

Because Petitioner alleges for the first time her rights of privacy embodied in the Fourteenth Amendment and the ICCPR, and the constitutionality of Civil Code section 56.10(c)(4), this Court is without jurisdiction to decide the merits of her Petition, and the Petition should be dismissed summarily. *Cardinale v. Louisiana*, 394 U.S. 437, 439, 22 L.Ed. 2d 398, 401 (1969); *Webb v. Webb*, 451 U.S. 493, 501-502, 68 L.Ed. 2d 392, 400 (1981).

To the extent the Court determines Petitioner preserved properly review of her alleged Fourteenth Amendment right of privacy violation, the Petition must be denied also because Respondents are a private individual and a private entity, not subject to Fourteenth Amendment scrutiny. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-350, 42 L.Ed. 2d 477, 482-484 (1974). Further, Petitioner failed to address Respondents' status as "state actors" in the lower courts devoiding this Court of jurisdiction to determine this issue raised here for the first time.[2]

Lastly, even assuming Petitioner can surmount these procedural hurdles, this Court has upheld previously the

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[2] Petitioner's failure to address previously Respondents' purported "state action" evidences further the previously determined issues pertaining to violation of right of privacy were limited to Petitioner's state constitutional right of privacy which applies to private as well as governmental entities. *Hill v. National Collegiate Athletic Ass'n.*, 7 Cal. 4th 1, 20 (1994).

constitutionality of statutes that *require* disclosure of confidential medical information. *H.L. v. Matheson*, 450 U.S. 398, 67 L.Ed. 2d 388 (1981); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. ___, 120 L.Ed. 2d 674 (1992); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 111 L.Ed. 2d 405 (1990). Accordingly, the issue Petitioner seeks this Court to determine has already been decided.

III.

ARGUMENT

A. The Issues Petitioner Raises Were Not Considered or Determined by the Lower Courts.

1. This Court is Without Jurisdiction to Decide Issues Raised Here for the First Time.

It was very early established that the United States Supreme Court will not decide federal constitutional issues raised in the Supreme Court for the first time on review of state court decisions. *Cardinale, supra*, 394 U.S. at 438, 22 L.Ed. 2d at 400. Delivering the *Cardinale* court's decision, Justice White commented:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality.

Cardinale, 394 U.S. at 439, 22 L.Ed. 2d at 400.

In *Webb v. Webb*, 451 U.S. 493, 68 L.Ed. 2d 392 (1981), Justice White again commented on the *Cardinale* rule:

> At the minimum, however, there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

Webb v. Webb, 451 U.S. 493, 501, 68 L.Ed. 2d 392, 400 (1981) (emphasis in original).

In *Webb*, petitioner sought review of a Georgia Supreme Court decision alleging she invoked properly the "full faith and credit" clause of the Federal Constitution. *Webb*, 451 U.S. at 496, 68 L.Ed. 2d at 396. Petitioner argued further since the Georgia Constitution did not contain specifically a "full faith and credit" clause, "there can be no doubt that the above references in the record were to the Federal Constitution and therefore that her federal claim was properly presented." *Webb*, 451 U.S. at 497, 68 L.Ed. 2d at 397. Delivering the court's opinion dismissing the petition, Justice White stated: "The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions . . . We see no reason to deviate from [the rule] now." *Webb*, 451 U.S. at 499, 68 L.Ed. 2d at 398.

Similarly, in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 100 L.Ed. 2d 62 (1988), raising the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment – issues not raised properly below – the petitioner sought review of

the Mississippi Supreme Court's decision affirming imposition of a punitive damage award. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-80, 100 L.Ed. 2d 62, 71-73 (1988). Delivering the Court's opinion dismissing the Petition, Justice Marshall commented, "A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Bankers*, 486 U.S. at 77, 100 L.Ed. 2d at 71.[3]

2. Petitioner's "Constitutional" Right of Privacy Claim.

Here, Petitioner purports on page 16 of her Petition, "the phrase 'constitutional right to privacy' as set forth in Petitioner's Brief on the Merits to the California Supreme Court is used in reference with the United States Constitution as well as the California Constitution." However, a thorough review of Petitioner's Brief on the Merits does not reveal a single reference to the Fourteenth Amendment or to a United States Supreme Court decision interpreting the Fourteenth Amendment.

At best, Petitioner refers to her "constitutional right to privacy," in a fashion similar to the *Webb* petitioner's reference to the "full faith and credit" clause. As *Webb* makes clear, a generic reference to a constitutional provision does not preserve properly a federal claim. *Webb*, 451

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[3] Since *Cardinale*, this Court repeatedly upheld its rule. See, e.g., *Buchanan v. Kentucky*, 483 U.S. 402, 404, n. 1, 97 L.Ed. 2d 336, 344 (1987); *Fuller v. Oregon*, 417 U.S. 40, 50, 40 L.Ed. 2d 642, 653 (1974); *Tacon v. Arizona*, 410 U.S. 351, 352, 35 L.Ed. 2d 346 (1973); *Hill v. California*, 401 U.S. 797, 28 L.Ed. 2d 484 (1971).

U.S. at 497, 68 L.Ed. 2d at 397. *Accord, Bankers Life & Casualty*, 486 U.S. at 77, 100 L.Ed. 2d at 71. *See, Taylor v. Illinois*, 484 U.S. 400, 407, n. 9, 98 L.Ed. 2d 798, 809 (1988) ("A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights . . . ").

Moreover, it is clear both the California Supreme Court and the Fifth District Court of Appeal did not believe Petitioner presented any federal issues. Discussing Petitioner's alleged violation of her constitutional right of privacy, the California Supreme Court stated:

> Plaintiff's 12th cause of action names as defendants Yamaguchi and Norcal only, and alleges that Yamaguchi secretly disclosed confidential information to Norcal and its agents and employees *in violation of plaintiff's constitutional right to privacy under article I, section 1 of the California Constitution.*

(Appendix – California Supreme Court Opinion, p. 12a.) (emphasis added.)

Additionally, the California Supreme Court held "[w]e conclude that, as a matter of law, *plaintiff has failed to state a cause of action for invasion of her state constitutional privacy interest,*" (Appendix, California Supreme Court Opinion, p. 13a), and "in our view, plaintiff has not alleged a sufficiently serious invasion of her privacy interest to warrant actionable relief under *the privacy clause of our state Constitution.* (Appendix, California Supreme Court Opinion, p. 16a.) (emphasis added.)

Similarly, the Fifth District Court of Appeal held " . . . the privilege created by section 47, subdivision (2)

must yield to *the right of privacy created by article I, section 1, of the California Constitution.* (Appendix – California Fifth District Court of Appeal Opinion, p. 62a.)

Clearly, even if the California Supreme Court considered Petitioner's Fourteenth Amendment right of privacy claim, its decision rests on an interpretation of the California state constitution's privacy provision.

3. Petitioner's "International Covenant on Civil and Political Rights" Right of Privacy Claim.

Relying on *Dewey v. City of Des Moines*, 173 U.S. 193, 43 L.Ed. 665 (1899), Petitioner alleges this Court should recognize her right of privacy embodied in the ICCPR as a "mere enlargement" of her previous privacy claims. Under the mere enlargement doctrine, "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Dewey v. Des Moines*, 173 U.S. 193, 198, 43 L.Ed. 665, 666 (1899). As recognized in *Bankers Life & Casualty, supra*, "*Dewey* makes clear, however, that the federal question must be brought to the attention of the court below in some manner. 'A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it.' " *Bankers Life & Casualty*, 486 U.S. at 78, n.2, 100 L.Ed. 2d at 72 (quoting *Dewey*).

Here, Petitioner concedes in the first full paragraph of page 19 of her Petition, the ICCPR had not been adopted until after she filed her appeal in the California Fifth District Court of Appeal. In the same paragraph, she

also concedes *"the Court of Appeal did not mention the ICCPR* in its ruling." (emphasis added.)

Similarly, in the first full paragraph of page 20 of her Petition, Petitioner concedes the ICCPR was *"not expressly mentioned* in the briefing before the California Supreme Court." Petitioner also concedes in the second full paragraph of page 20 of her Petition, "the Supreme Court had the discretion to take judicial notice, *sua sponte*, of the ICCPR but *did not mention it* in its decision." (emphasis added.)

Lastly, in an attempt to urge this Court to take up the interpretation of the ICCPR, Petitioner argues in the first full paragraph on page 22, "the ICCPR right of privacy, though given its force and effect through the Supremacy Clause of the Constitution, *is a separate federal right* which Petitioner respectfully requests this Court to interpret." (emphasis added.)

Clearly, Petitioner neither raised the privacy provisions of the ICCPR below, nor did the California Courts base their decisions thereon. Thus, this Court is without jurisdiction to interpret the same for Petitioner. Raising the ICCPR at this stage of the proceeding exceeds the "mere enlargement" exception set forth in *Dewey*. By Petitioner's own admission, her ICCPR privacy right is a separate federal right, i.e., not a "mere enlargement." (Petition, p. 22.) Since Petitioner never made or asserted her ICCPR privacy claim, Petitioner cannot say she has been denied that right by the California Supreme Court. *Dewey, supra*, 173 U.S. at 200, 43 L.Ed at 667.

4. Petitioner Did Not Raise Previously The Constitutionality of Civil Code Section 56.10(c)(4).

Once again, a thorough reading of the Fifth District Court of Appeal's Opinion (Appendix – p. 60a), Petitioner's Answer Brief on the Merits (Appendix – pp. 100a-102a), and the California Supreme Court's Opinion (Appendix – pp. 6a-11a) regarding Civil Code section 56.10(c)(4) reveals Petitioner never raised, and the California courts never ruled on, Section 56.10(c)(4)'s constitutionality. Petitioner cannot now raise the constitutionality of the statute for the first time. *Cardinale, supra,* 394 U.S. at 438-439, 22 L.Ed. 2d at 400-401.

5. Petitioner Did Not Raise Previously Respondents' Purported Capacity as "State Actors."

Had Petitioner sought to invoke the provisions of the Fourteenth Amendment, one would expect to find a discussion of Respondents' purported "state action." Once again, throughout Petitioner's discussion regarding violation of her right of privacy (Appendix – Answer Brief on the Merit, pp. 90a-100a), the Fifth District Court of Appeal's Opinion (Appendix – pp. 60a-62a), and the California Supreme Court's Opinion (Appendix – pp. 12a-15a), there is no discussion regarding the necessary requirement of state action to invoke Fourteenth Amendment scrutiny. Petitioner's failure to raise previously the state action issue is particularly illuminating considering the California constitutional privacy provision does not require a showing of state action before its protections are invoked. *Hill v. National Collegiate Athletic Ass'n.,* 7 Cal. 4th 1, 20 (1994). Petitioner cannot now raise state action

for the first time. *Cardinale, supra*, 394 U.S. at 438-439, 22 L.Ed. 2d at 400-401.

B. Petitioner Fails to Invoke the Requisite State Action to Subject Respondents to Fourteenth Amendment Scrutiny.

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." In 1883, this Court in the Civil Rights Cases, 109 U.S. 3, 27 L.Ed. 835, affirmed the essential dichotomy set forth in that Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, "however discriminatory or wrongful," against which the Fourteenth Amendment offers no shield. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 42 L.Ed. 2d 477, 483 (1974), *quoting, Shelley v. Kraemer*, 334 U.S. 1, 92 L.Ed. 1161 (1948).

Here, Petitioner claims state action can be found based on Respondent Norcal's role as a regulated insurance company coupled with the Court's actions in allegedly depriving Petitioner of her privacy rights. (Petition, pp. 13-15.)

Petitioner's argument regarding Norcal's status as a regulated industry was considered and rejected in *Jackson, supra*. In *Jackson*, the Petitioner alleged respondent public utility was extensively regulated by the State of Pennsylvania, and as such, the utility's actions in terminating her utilities, was the state's action.

Delivering the Court's opinion dismissing the Petition, then, Justice Rehnquist stated:

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. . . . [T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-351, 42 L.Ed. 2d 477, 483-484 (1974).

"The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004, 73 L.Ed. 2d 534, 546 (1982) (private nursing home's decision to discharge or transfer Medicaid patient not state action).

Similarly, here, Petitioner argues state action should be presumed because the professional liability insurance industry is regulated by the State of California and the number of professional liability carriers is limited, apparently implying a monopoly. Petitioner has failed to show the necessary nexus between Respondent Norcal and the State such that Norcal's actions can be charged to the State.

Further, if Petitioner's argument were true,

> Doctors [such as Respondent Yamaguchi], optometrists, lawyers, Metropolitan, and Nebbia's upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, "affected with a public interest." We do not believe that such a status converts their every action, absent more, into that of the State.

Jackson, 419 U.S. at 354, 42 L.Ed. 2d at 485-486.

Additionally, Petitioner's reliance on *Shelley v. Kraemer*, 334 U.S. 1, 92 L.Ed. 1161 (1947) is misplaced. If the Court had interpreted *Shelley* in the manner Petitioner proposes, there would not exist state action cases subsequent to *Shelley*. This Court has rejected such an expansive reading of *Shelley* and has maintained a state-private distinction. See, e.g., *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 102 L.Ed. 2d 469 (1988) (participation of national collegiate athletic association in events which led to suspension of basketball coach by member state university not state action under Fourteenth Amendment's due process clause); *Blum, supra; Polk County v. Dodson*, 454 U.S. 312, 320, 70 L.Ed. 2d 509 (1981) (state compensated public defender acts in private capacity when defending private client in conflict with State); *Jackson, supra*.

Thus, Respondents are not subject to Fourteenth Amendment scrutiny because they did not act on the State's behalf.

IV.

THE CALIFORNIA SUPREME COURT'S OPINION IS CONSISTENT WITH THIS COURT'S WELL-ESTABLISHED RULES REGARDING DISCLOSURE OF MEDICAL INFORMATION.

The constitutionality of disclosure of medical information is not a novel issue for this Court. In *H.L. v. Matheson*, 450 U.S. 398, 67 L.Ed. 2d 388 (1981), this Court held a Utah statute that required a physician to "notify, if possible," the parents of a minor seeking an abortion did not violate her Fourteenth Amendment right of privacy. *H.L. v. Matheson*, 450 U.S. 398, 407, 413, 67 L. Ed. 2d 388, 397, 401 (1981). *Accord, Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 518-520, 111 L.Ed. 2d 405, 423-425 (1990); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. ___, 120 L.Ed. 2d 674, 728-729 (1992).

Here, the California Supreme Court, relying on its previous decision in *Hill, supra*, determined Petitioner failed to "plead facts supporting a conclusion that any expectation of privacy as to her medical condition would be reasonable under the circumstances . . . " (Appendix – California Supreme Court Opinion, p. 13a.) The California Supreme Court held further:

> The discussions between [Respondents] Yamaguchi and Norcal could not be considered sufficiently serious in their scope or impact to give rise to an actionable invasion of privacy. Because the information would most likely have been discovered during the ordinary course of litigation, defendants' conduct in revealing information about plaintiff's treatment and

> physical condition does not violate the state constitutional guarantee against invasion of privacy as a matter of law.

(Appendix – California Supreme Court Opinion, p. 15a.)

Similar to the minor who places her medical condition at issue by seeking an abortion, by filing the underlying action, Petitioner placed her physical condition at issue. By seeking judicial intervention, Petitioner's expectation of privacy regarding her medical condition, as is the minor's expectation of privacy in the fact that she is seeking an abortion, was substantially lowered. In contrast to this Court's previous decisions requiring disclosure to her parent the minor's request for an abortion – information one would expect to have either already been provided by the minor to her parent or that the minor did not want her parent to know – Petitioner alleges Respondent Yamaguchi purportedly disclosed information that "would most likely have been discovered during the ordinary course of litigation . . . " (Appendix – California Supreme Court Opinion, p. 15a.) Thus, the California Supreme Court's opinion that Respondents did not violate Petitioner's right of privacy is consistent with this Court's prior opinions regarding disclosure of medical information.

V.

THIS IS NOT AN APPROPRIATE CASE FOR THE COURT TO REVIEW DUE TO THE INADEQUATE RECORD.

This Court has traditionally exercised sparingly its power to grant Writs of Certiorari, typically limiting its

docket to cases with the potential for significant nationwide negative impact. Respondent Yamaguchi submits this is not an appropriate case for the Court to review because of the inadequate record pertaining to the Fourteenth Amendment issues Petitioner now raises. Petitioner's failure to raise previously these issues through demurrers to five complaints, and review by California's Fifth District Court of Appeal and Supreme Court should not be validated at the expense of this Court's precious resources. Interpretation of a Constitutional issue "is a question of some moment and difficulty," (*Bankers' Life & Casualty, supra,* 486 U.S. at 79, 100 L.Ed. 2d at 73), and Petitioner should have developed the record regarding that interpretation below, not here. *See, Mishkin v. State of New York,* 383 U.S. 502, 512-513, 16 L.Ed. 2d 56, (1966) ("The far-reaching and important questions tendered by this claim are not presented by the record with sufficient clarity to require or justify their decision").

Granting the Petition would most likely result in an eventual remand to the California courts to determine issues that Petitioner should have litigated prior to filing her Petition. Accordingly, her Petition should be denied.

VI.

CONCLUSION

Respondent Yamaguchi respectfully requests the Court summarily deny the Petition for Writ of Certiorari.

DATED: November 18, 1994

Respectfully submitted,

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Supreme Court
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No. 94-822

In The

Supreme Court of the United States

October Term, 1994

DORIS HELLER,

Petitioner,

vs.

NORCAL MUTUAL INSURANCE CO., et al.,

Respondents.

Petition For Writ Of Certiorari To California Supreme Court

BRIEF IN OPPOSITION BY RESPONDENT NORCAL MUTUAL INSURANCE CO.

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QUESTION PRESENTED

Petitioner's physician communicated with his insurer during litigation petitioner was pursuing against a second physician and petitioner then sued alleging violations of the California state law but did not raise any issues under federal law. This court has consistently refused to hear federal issues that have not been raised in the state courts. Should this court grant the petition based on federal law which was not raised in the state court proceedings?

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STATEMENT OF THE CASE

This matter has a long procedural history because petitioner had difficulties attempting to state a cause of action. She was allowed a Fourth Amended Complaint, her fifth pleading attempt, before the court finally dismissed the matter against Norcal Mutual Insurance Company (hereinafter referred to as Norcal),[1] Kent Yamaguchi, M.D. (hereinafter referred to as Dr. Yamaguchi), and other parties who are no longer part of the proceeding.

A. Petitioner's Allegations In The Trial Court.

Petitioner's theory was that Norcal and Dr. Yamaguchi somehow conspired to share confidential information about her during her malpractice action against another physician, John Geis, M.D. That initial malpractice action eventually settled for $400,000.00 for the loss of the fourth digit of the left hand. Significantly, petitioner's trial court pleadings and appellate court briefs all failed to set forth any supposed confidential facts that Dr. Yamaguchi disclosed.

It can be assumed after petitioner's filing of numerous pleadings that she cannot state any specific facts which were disclosed. In fact, petitioner's deposition of Dr. Yamaguchi was submitted to the California

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[1] Norcal has no parent companies or non-wholly owned subsidiaries pursuant to United States Supreme Court Rules, Rule 29.1.

Supreme Court in its entirety and no confidential information disclosure was shown other than that authorized in the petitioner's malpractice action against Dr. Geis.

B. Decision of the California Fifth District Court of Appeal.

The Fifth District Court of Appeal in California reversed only those causes of action based on the California constitutional right to privacy and the alleged statutory violation of Civil Code sections 56.10, *et seq.* The court found that the information allegedly gathered probably was discoverable, and even admissible, but that the method of disclosure was improper.

C. Decision of the California Supreme Court.

The California Supreme Court reversed the appellate court ruling that the entire matter be dismissed as against these respondents.[2] The Supreme Court interpreted Civil Code sections 56.10, *et seq.* and the California right to privacy consistent with the arguments made by the respondents throughout the proceedings. There were no new issues or surprises by the California Supreme Court and petitioner had ample opportunity throughout the proceedings to assert any federal constitutional grounds that she may have felt applicable and simply did not do so.

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[2] A cause of action for alleged medical negligence against Dr. Yamaguchi was still pending in Superior Court as it had not been dismissed.

SUMMARY OF FACTS AND ARGUMENT

The Petition for Writ of Certiorari should be summarily denied as petitioner never raised any federal issues during the entire proceedings in California. None of her pleadings, and more particularly none of the briefs before the appellate court and Supreme Court, referred to the federal constitutional right of privacy, the Fourteenth Amendment to the United States Constitution, the International Covenant on Civil and Political Rights, or any other alleged federal right.

Throughout her case, petitioner focused on the interpretation of California Civil Code sections 56.10, *et seq.* and the California right of privacy as encompassed in Article I, section 1, of the California Constitution. At no time did petitioner ever assert that sections 56.10, *et seq.* were unconstitutional nor did she ever argue any state action or applicability of the Fourteenth Amendment. Petitioner has failed to state any valid reason for this court to exercise jurisdiction.

ARGUMENT

I. THIS PETITION SHOULD BE DENIED BECAUSE NO FEDERAL ISSUE WAS RAISED IN THE CALIFORNIA COURTS.

A. Review Should Not Be Granted Because No Issues Of Federal Law Were Pressed Or Passed Upon By The California Supreme Court.

"[I]t is only final judgments with respect to issues of federal law that provide a basis for [United States

Supreme Court] appellate jurisdiction with respect to state court cases." (*New York Times Company v. Jascalevich*, 439 U.S. 1317, 1318, 99 S.Ct. 6 (1978).) Where an issue of federal law has not been both asserted and adjudicated in the State Court, this court will not exercise appellate jurisdiction. (*McGoldrick v. Campagnie Generale Transatlantique*, 309 U.S. 430, 434-435, 60 S.Ct. 670 (1940); see also *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161 (1969).) This is not the type of "exceptional case" which would justify such jurisdiction:

> [I]t is . . . the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. . . . Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there.

(*McGoldrick* at 434.) The *McGoldrick* decision is consistent with a long line of cases from this court. Petitioner's citation of this court's decision over 90 years ago in *Dewey v. Des Moines*, 173 U.S. 193, 19 S.Ct. 379 (1899), is misleading since that case stands for the proposition that the record in the state court must support her claim that an asserted federal right was denied.

> A claim or right which has never been made or asserted cannot be said to have been denied

> by a judgment which does not refer to it. . . . A point that was never raised cannot be said to have been decided adversely to a party who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment which is silent upon the question is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of.

(*Id.* at 200.)

The federal constitutional claim in *Dewey* was not raised in the state court and the record did not clearly implicate "a provision of the constitution or act of congress." (*Dewey*, 173 U.S. at 198-199.)

Petitioner never raised any federal issues in the California courts. Her Fourth Amended Complaint alleged in the twelfth cause of action that the acts of respondents "betrayed [petitioner's] constitutional right of privacy," but did not specify any assertion of a federal constitutional right. (Respondent's Appendix, pp. 1-3.) Thereafter, every brief petitioner filed asserted only the right of privacy contained in the California constitution.[3] Contrary to petitioner's assertions, no reference was made to privacy rights under any federal authorities in her

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[3] Respondent's appendix: Heller's Opening Brief in the Fifth District Court of Appeals, pp. 4-11; Heller's Reply Brief in the Fifth District Court of Appeals, pp. 12-15; Heller's Answer to Petition for Review in the California Supreme Court, pp. 16-21. Petitioner's Appendix: Heller's Answer Brief on the Merits in the California Supreme Court, pp. 90a-100a.

answer brief on the merits in the California Supreme Court.[4]

B. The Decision Of The California Supreme Court Was Based On California Law.

The ruling of the California Supreme Court was based only on the California constitution, and California statutes. The court specifically identified the issues as whether ex parte discussions "between a nonparty treating physician and the defendant physician's malpractice insurer" violated either Civil Code sections 56.10, *et seq.* or "plaintiff's constitutional right to privacy under article I, section 1 of the California constitution." (*Heller v. Norcal Mutual Insurance Company*, 8 Cal.4th 30, 34-35 (1994).)[5]

The court determined that no constitutional right was violated stating because "plaintiff has failed to establish the second essential element of a *state* constitutional cause of action for invasion of privacy." (*Id.* at 43, emphasis added.) The court did not mention the federal

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[4] Petitioner also apparently contends that the mere reference to federal cases in *Hill v. NCAA*, 7 Cal.4th 1 (1994) is enough to raise a federal question in the case. However, she cites no authority to support this contention. Such an exclusion is contrary to the cases cited above which require that the federal question appear *in the record* of the case *before the court*. (See, *e.g.*, *Dewey*, 173 U.S. at 200.)

[5] Even when a federal question has been asserted in the state court, if the case is decided on independent and adequate state grounds, this court will not review the state court's ruling. (*Hammerstein v. Superior Court of California*, 340 U.S. 622, 623, 71 S.Ct. 521 (1951); *Edelman v. People of State of California*, 344 U.S. 357, 361-362, 73 S.Ct. 293 (1953).)

constitution or any international treaties as those were not issues raised by petitioner. After the opinion issued the petitioner did not request a rehearing and made no attempt to raise any federal constitutional or treaty issues.[6] Furthermore, there is no state action involved which would make the Fourteenth Amendment apply.

II. PETITIONER HAS NOT ESTABLISHED A CLAIM UNDER THE FOURTEENTH AMENDMENT.

A. There Was No State Action By Respondents.

This court has often held that to establish a Fourteenth Amendment claim against a private defendant, the plaintiff must establish "state action" by that defendant. (See *e.g., National Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 191, 109 S.Ct. 454 (1988); *Rendell-Baker v. Kohn*, 457 U.S. 830, 837-838, 102 S.Ct. 2764 (1982).) Moreover, the mere regulation of a private business by the state is not sufficient to render the conduct of the business "state action" as explained by this court:

> The mere fact that a business is subject to state regulation does not by itself convert its action to that of the state for purposes of the Fourteenth Amendment. . . . It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus

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[6] California Rules of Court, Rule 27, allows a party to request a rehearing after the decision has been rendered.

> between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

(*Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-351, 95 S.Ct. 449 (1974); see also *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965 (1972).)

In *Jackson v. Edison*, petitioner brought an action against a privately owned and operated utility after her electrical service was terminated. (419 U.S. at 347-348.) This court rejected contentions that the utility's conduct constituted state action either because the state extensively regulated it or because a monopoly status had been conferred.[7] Neither of these factors were sufficient to render the utility's conduct "state action" for purposes of the Fourteenth Amendment.[8]

> All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory,

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[7] Petitioner also cites *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 65 S.Ct. 226 (1944), as suggesting that the existence of a monopoly is relevant in determining whether state action exists. However, a review of *Steele* does not disclose any such statement by the court. Moreover, any such conclusions would be contrary to the court's subsequent holding in *Jackson v. Edison*.

[8] The court also rejected contentions that the respondent's conduct was state action because it provided an essential service, and that the state had approved the termination procedure. (*Jackson*, 419 U.S. at 353-355.)

> and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law. Under our decision, this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State for purposes of the Fourteenth Amendment.

(419 U.S. at 358; see also *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965 (1972).)

Similarly, regardless of Norcal Insurance Company's membership in the Joint Underwriting Association, or California's regulation of the insurance industry in that state, Norcal is a private corporation. There is no state involvement other than insurance industry regulation. Nearly every industry is subject to state regulation of some sort and such regulation does not constitute "state action." (*Jackson*, 419 U.S. at 354.)[9] Also, there is no evidence that Norcal enjoyed a monopoly in California. Under established case law, its acts cannot be considered state action.[10]

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[9] As stated by Justice Rehnquist in *Jackson*:

> Doctors, optometrists, lawyers, Metropolitan, and Nebbia's upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, "affected with a public interest." We do not believe that such a status converts their every action, absent more, into that of the State.

(*Jackson*, 419 U.S. at 354.)

[10] Petitioner's cases asserting state action because of state judicial decisions are inapposite as dealing with racially restrictive covenants (*Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1947))

B. There Was No Violation Of Fourteenth Amendment Rights.

1. A balancing of privacy rights against disclosure was appropriate.

State action is lacking and petitioner cites no authority for her assertion that a compelling state interest must be shown to justify a violation of privacy interest under the federal constitution. Indeed, the federal cases have not set forth such a standard.

This court has considered the constitutionality of a statute requiring physicians to report the names and addresses of patients prescribed certain drugs. (*Whalen v. Roe*, 429 U.S. 589, 591-593, 97 S.Ct. 869 (1977).) The statute was challenged as allegedly violating two types of privacy interests – avoiding disclosure of personal matters, and making certain kinds of important decisions without governmental interference. (*Id.* at 599-600.) However, the court found that the statute did not pose a significantly grievous threat to either interest. (*Id.* at 600.) Therefore, the court reversed a lower court's decision enjoining the statute's enforcement. (*Id.* at 606.)

In testing the state's constitutionality, the court did not require a compelling state interest. Rather, the court was satisfied that the statute was "[t]he product of an orderly and rational legislative decision" based on the

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and labor dispute picketing. (*American Federation of Labor v. Swing*, 312 U.S. 321, 61 S.Ct. 568 (1941).)

state's "reasonable exercise of New York's broad police powers." (*Id.* at 597-598.)[11]

In fact, the cases which have required the showing of a compelling government interest are those which have involved a fundamental right. Petitioner did not allege or establish the violation of a fundamental right in this case. The only privacy interest allegedly invaded is her relationship with a physician who treated her for the same malady for which she was suing another physician. She did not allege any interference with marriage, procreation, family relationships, child rearing or education. (*Whalen*, 429 U.S. at 600, fn. 26 and 604, fn. 33; see also *Carey v. Population Services International*, 431 U.S. 678, 688-689, 97 S.Ct. 2010 (1977); *Griswold v. State of Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965).)

Petitioner cited no cases supporting her contention that the right to choose a physician is protected by a compelling state interest test under the Fourteenth Amendment. Moreover, none of the appellants in these cases asserted the right to choose a physician as the right allegedly violated. Finally, petitioner's right to choose a physician was not an issue.

She cites a case involving a statute making it unlawful for the physicians to discuss contraception with married persons. (*Griswold*, 381 U.S. 479, 480.) Because of the

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[11] Consistent with this court's decision in *Whalen*, was the decision in *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S.Ct. 2777 (1977), where the court balanced the intrusion of the government's conduct against the appellant's asserted privacy rights. (*Id.* at 465.)

adverse impact on the marital relationship, the statute was considered unconstitutional. (*Id.* at 486.)

She then cites *Doe v. Bolton*, 410 U.S 179, 93 S.Ct. 739 (1973), which involved a statute making abortions illegal except in certain situations and then only when various procedural criteria were met. (*Id.* at 181-184.) The court held that certain procedural requirements in the statute violated the appellant's constitutional rights and struck those provisions from the statute. (*Id.* at 201-202.) The court never discussed the right to choose a physician. The *Doe* decision was based solely upon the patient's right to choose an abortion, and the physician's right to practice his profession without unwarranted interference. Neither of these issues have been raised in this case.

Finally, petitioner relies upon *Mills v. Rogers*, 457 U.S. 291, 102 S.Ct. 2442 (1982), which deals with a Fourteenth Amendment interest in refusing unwarranted treatment. However, petitioner has not asserted a right to refuse treatment in this case. Moreover, it is difficult to imagine how a physician's contacts with his own insurance company could deny petitioner the right to refuse treatment by the physician.

Because petitioner did not plead or establish a fundamental right violation, there is no authority to weigh any alleged privacy violation under the federal constitution. Thus, it cannot be asserted that the California Supreme Court acted inappropriately by balancing the interests under the California Constitution.

2. The California Supreme Court did not apply the law inconsistently.

Petitioner has cited *Hill v. NCAA*, 7 Cal.4th 1 (1994), out of context. Contrary to her assertion, the California right to privacy can be adjudicated as a matter of law as Chief Justice Lucas explained:

> Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court. . . . Whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law in fact. *If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law.*

(*Hill*, 7 Cal.4th at 40, emphasis added.)

In *Heller,* the court reviewed a ruling sustaining a demurrer without leave to amend. Pursuant to state law, the consideration of the demurrer required that the court accept the allegations as being true, which the court did. (*Heller*, 8 Cal.4th at 36.) Therefore, the facts before the court were undisputed for purposes of its review.

Based upon those undisputed facts, the court determined that petitioner had not pled either a legally protected privacy interest, or a reasonable expectation of privacy in information that would have eventually been discovered in litigation. (*Id.* at 45.) The court additionally concluded that she had not alleged a sufficiently serious invasion of her privacy interests to warrant actionable

relief under the privacy clause of the state constitution. (*Id.* at 45-46.)

Since the court determined that the undisputed material facts before it showed no reasonable expectation of privacy or an insubstantial impact on privacy interests, the court correctly applied the law as stated in *Hill v. NCAA*.

III. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) WAS NEITHER RAISED NOR IS IT APPLICABLE.

A. Petitioner Made No Reference To The ICCPR In The California Courts.

The presumption against addressing questions not pressed or passed upon the California courts applies to the interpretation of an international treaty.

Petitioner's failure to raise any issues involving the applicability and interpretation of the ICCPR in the California courts weighs so heavily that this court should not take up these issues which were never briefed or considered previously. This would be in keeping with this court's policies regarding the following needs: respecting comity of the state court; requiring a properly developed record on appeal; and scrupulously adhering to the customary limitations on discretion where difficult issues are involved. (*Banker's Life and Casualty Company v. Crenshaw*, 486 U.S. 71, 79, 108 S.Ct. 1645 (1988).)

No mention of the ICCPR was made until filing of the petition with this court. Petitioner failed to do so even though the United States signed the Covenant on or

about March 23, 1966, (*People v. Ghent*, 43 Cal.3d 739, 781 (1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1099 (1988)) over 23 years before petitioner filed her suit against the respondents on August 22, 1989. The Covenant was ratified by the United States Senate on or about September 8, 1992 (Dept. of State Public Notice 1853, 58 Fed.Reg. 104(a) (1993)), after petitioner had filed her reply brief in the intermediate court of appeal but over eight months before oral argument in that court. She failed to raise it even though the appellate court has provisions for citation of new authorities prior to oral argument.[12] The Covenant was then published in the *Federal Register* on August 31, 1993, two weeks before the petitioner filed her opposition to Norcal's Petition for Review before the California Supreme Court and over five months before she filed her brief on the merits.

Petitioner had ample time in which to raise issues involving an international treaty before the California Supreme Court and failed to do so.

B. The ICCPR Does Not Apply As It Was Non-Self-Executing.

Petitioner's argument that the ICCPR provides expanded rights of privacy is fatally flawed because Article 17 upon which she relies is not self-executing. Treaties have immediate domestic effect as the supreme law of the

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[12] The Fifth District Court of Appeals sent out a notice requesting citation of any new authorities which the parties wished to bring to the court's attention. (Respondent's Appendix, pp. 23-24.)

land under Article VI, Clause 2 of the United States Constitution only when they are self-executing. In this case, the United States Senate presented its advice and consent to the ICCPR subject to the following declaration:

> That the United States declared that the provisions of Articles 1 through 27 of the Covenant (ICCPR) are not self-executing.

(Department of State Public Note 1853, 58 Fed.Reg. 104a (1993).) Based on that Senate declaration the courts in the United States cannot give the treaty effect as domestic law in the absence of necessary implementation. (Restatement (3rd) of Foreign Relations Law of the United States (1986) §§ 111(3) and (4).) In interpreting such a treaty the federal courts have to examine the ratification history including senate reservations, understandings, and declarations made in conjunction with the advise and consent power. (*United States v. Stewart*, 489 U.S. 353, 366, 109 S.Ct. 1183 (1988).)[13]

Petitioner argued that the declaration of non-self-execution by the Senate is void and she relies on a decision from the District of Columbia Circuit Court in *Power Authority v. Federal Power Commission*, 247 F.2d 538 (D.C. Cir. 1957) which in fact was vacated by this court in *Power Authority of New York v. Federal Power Commission*, 355 U.S.

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[13] Petitioner misapplies the decisions in *U.S. v. Percheman*, 32 U.S. (7 Pet.) 51, 82 (1833), *Burgess v. Gray*, 57 U.S. (16 How.) 48, 50 (1853), and *People of Saipan v. United States Department of Interior*, 502 F.2d 90 (1974), as those cases involved interpretation of treaties where the United States Senate and the treaties made no specific comment on the issue of self-execution.

64, 78 S.Ct. 141 (1957). The decision to vacate the judgment of the lower court "deprives that court's opinion of precedential effect. . . . " (*O'Connor v. Donaldson*, 422 U.S. 563, 577, fn. 12, 955 S.Ct. 2486 (1975).)

CONCLUSION AND SUMMARY

Petitioner made no attempt to raise any issues involving the federal constitution or international treaties in her voluminous pleadings and arguments before the courts in the State of California. She now wishes to invoke this court's jurisdiction at the eleventh hour by purportedly raising federal issues only because she failed in her efforts to convince the California Supreme Court to interpret California Civil Code sections 56.10, *et seq.* and the California constitutional right to privacy in a manner supportive of her claims. She failed and should not be allowed to change her arguments by attempting to invoke this court's jurisdiction. This is especially true where state action is lacking and petitioner's theories of federal law violations are not applicable.

DATED: November 25, 1994

Respectfully submitted,

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Norcal Mutual Insurance Co.

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DORIS HELLER

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

* * *

DORIS HELLER,

Plaintiff,

vs.

NORCAL MUTUAL INSURANCE CO.; KENT YAMAGUCHI, M.D.; VALLEY PLASTIC SURGEONS MEDICAL GROUP, INC., sued herein as DOE 2; CENTRAL CALIFORNIA FACULTY MEDICAL GROUP, INC.; HERBERT W. BORRO, M.D., sued herein as DOE 1; DOES 2 through 10, Inclusive; DOES 11 through 20, Inclusive; and DOES 21 through 30, Inclusive,

Defendants.

_____/

SUMMONS ISSUED
CASE NO. 405369-0

FOURTH AMENDED COMPLAINT FOR DAMAGES

(1) MEDICAL NEGLIGENCE;
(2) NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS;
(3) NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS;
(4) NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS;

(5) INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS;
(6) INTENTIONAL INTERFERENCE WITH PHYSICIAN/ PATIENT CONTRACTUAL RELATIONSHIP;
(7) WRONGFUL DISCLOSURE OF CONFIDENTIAL MEDICAL INFORMATION [CC 56];
(8) WRONGFUL DISCLOSURE OF CONFIDENTIAL MEDICAL INFORMATION [CC 56];
(9) WRONGFUL DISCLOSURE OF CONFIDENTIAL MEDICAL INFORMATION [CC 56];
(10) UNFAIR BUSINESS PRACTICES;
(11) CONCEALMENT
(12) VIOLATION OF CONSTITUTIONAL RIGHT OF PRIVACY

(Filed Nov. 21, 1990)

* * *

12

TWELFTH CAUSE OF ACTION

(Violation of Constitutional Right of Privacy by DR. YAMAGUCHI and NORCAL MUTUAL INSURANCE COMPANY)

75. Plaintiff incorporates herein the allegations set forth in Paragraphs 1 through 23, inclusive, as if set forth here in full.

76. That at all times mentioned herein, Plaintiff was a patient of DR. YAMAGUCHI and during the course of his treatment of the plaintiff, he acquired confidential and private information.

77. That on or about June 15, 1988, October 18, 1988, December 15, 1988, December 22, 1988, and January 12, 1989, DR. YAMAGUCHI betrayed Plaintiff's constitutional right of privacy by secretly disclosing confidential and private information and other unknown information to NORCAL MUTUAL INSURANCE COMPANY'S and its agents and employees.

78. That the acts of NORCAL MUTUAL INSURANCE COMPANY and DR. YAMAGUCHI were done in violation of the discovery statutes and laws then in effect throughout the State of California.

79. As a direct and proximate result of the violation of Plaintiff's constitutional right to privacy by disclosing the above information, Plaintiff has sustained mental, emotional and financial damages in a sum to proved at trial.

* * *

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

DORIS HELLER, Plaintiff and Appellant, vs. NORCAL MUTUAL INSURANCE COMPANY, et al. Defendants and Respondents.	5 Civil No. F015875 Fresno County Superior Court No. 405369-0
DORIS HELLER, Petitioner, vs. SUPERIOR COURT, FRESNO COUNTY Respondent, NORCAL MUTUAL INSURANCE CO., et al., Real Parties in Interest.	

APPELLANT'S OPENING BRIEF

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

Honorable Gary R. Kerkorian

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* * *

V

EVEN IF CIVIL CODE SECTION 47(b) WERE APPLICABLE, IT WOULD BE OVERRIDDEN BY RESPONDENTS' VIOLATIONS OF APPELLANT'S CONSTITUTIONAL RIGHT OF PRIVACY.

In *Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836, a psychotherapist disclosed confidential matters concerning his patient in a lawsuit. The patient sued the psychotherapist for violating the patient's right to privacy. The trial court sustained the psychotherapist's demurrer without leave to amend, finding the disclosures privileged under the predecessor to Civil Code section 47(b).

The appellate court based its analysis on the *"the close analogy between a physician-patient and a psychotherapist-patient relationship.* (*Id.* at p. 483.) Relying on prior decisions which held that California's constitutional right of privacy protects medical information, the *Cutter* court concluded that details of the psychotherapists's [sic] professional relationship with his patient also fell within the zone of privacy protected by the state constitution. (*Id.* at pp. 842-843.) The court then noted that the predecessor of Civil Code section 47(b) would permit an infringement of

the right of privacy by denying a remedy in damages when an invasion of privacy occurred in a judicial proceeding. (*Id.* at p. 844.) Therefore, constitutional scrutiny was appropriate. (*Ibid.*) The court concluded that the constitutional right to privacy outweighed the policies underlying Civil Code section 47(b), and held that the psychotherapist's conduct was not protected by Civil Code section 47(b). (*Id.* at pp. 846-848.)

The instant case is indistinguishable from *Cutter* as applied to disclosures by YAMAGUCHI of constitutionally-protected private information of appellant. The *Cutter* analysis was based upon the analogy between a psychotherapist and a physician. YAMAGUCHI, as a physician, therefore falls within the *Cutter* reasoning and holding. Thus, Civil Code section 47(b) does not immunize YAMAGUCHI from wrongfully disclosing confidential material.

It has long been recognized that a person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature, than many other judicially protected areas, and as such, falls squarely within the protected ambit of the right of privacy delineated by the California Constitution. (See *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669, 678-679.) *Cutter* has been recognized in subsequent decisions as holding that the constitutional right to privacy outweighs the policies underlying the "judicial proceedings immunity" of Civil Code section 47(b). (See *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal.App.3d 1034, 1042, ftnt. 3.)

More recently, it has squarely been held that the disclosure by a medical doctor of medical information concerning a patient is *not* privileged under Civil Code section 47(b). The constitutional right of privacy prevails over the privilege as to medical doctors. In *Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, a doctor obtained information while examining the plaintiff in connection with a workers' compensation action. Although there was no confidential physician/patient relationship as to the medical examination arranged for the benefit of the workers' compensation carrier, in the course of that examination, the plaintiff revealed his HIV positive status at a time and for a purpose that had no connection with the workers' compensation case. (*Id.* at p. 1135.) Thus, the plaintiff was not deemed to have waived his physician/patient privilege as to his HIV positive status, which he had elected to disclose to alert the nurse to take special precautions in handling his blood. (*Ibid.*) Relying on *Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836, the court held that the constitutional right to privacy covered medical information and outweighed the policies underlying the judicial proceedings immunity of Civil Code section 47(b). (See *Urbaniak v. Newton, supra,* 226 Cal.App.3d 1128, 1141.)

Since *Urbaniak* applied the *Cutter* holding to a doctor who was not a psychotherapist, there is no basis for any contention in this case that the *Cutter* holding is to be limited to psychotherapists. *Urbaniak* makes it clear that the *Cutter* holding also applies to ordinary physicians. Therefore, Civil Code section 47(b) does not immunize a physician from disclosing confidential medical information in violation of the California constitutional right to

privacy. (*Urbaniak v. Newton*, (1991) 226 Cal.App.3d 1128, 1141; *Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836, 847-848.)

Another recent case, *ITT Telecom Products Corp. v. Dooley* (1989) 214 Cal.App.3d 307, 317-320, has held that Civil Code section 47(b) will not immunize a person who discloses information in violation of a contract of confidentiality. The court refused to grant immunity under Civil Code section 47(b) to the disclosure of trade secrets in violation of a contract of confidentiality. That reasoning also supports the inapplicability of Civil Code section 47(b) in the instant case. When appellant consulted YAMAGUCHI as a physician, the doctor by virtue of his fiduciary status entered into a contract of confidentiality of no lesser sanctity than that protected by the court in *ITT Telecom Products Corp. v. Dooley, supra.* Disclosures by YAMAGUCHI in violation of his fiduciary relationship with his patient are not immunized under Civil Code section 47(b), for the same reasons that other disclosures in violation of other contracts of confidentiality are not immunized. See *ITT Telecom Products Corp. v. Dooley, supra,* 214 Cal.App.3d 307, 317-320.)

VI

THE SUBJECT ORDERS SHOULD NOT BE UPHELD ON THE GROUND THAT APPELLANT WAIVED ALL OF HER PRIVACY EXPECTATIONS CONCERNING CONFIDENTIAL INFORMATION SHE ENTRUSTED TO YAMAGUCHI AND BORO.

Contrary to suggestions at the trial court level, the mere fact that appellant filed a medical injury action

against Dr. Geis does not mean that appellant waived *all* of her privacy expectations concerning confidential information in the possession of YAMAGUCHI and BORO. As stated in *Slagle v. Superior Court* (1989) 211 Cal.App.3d 1309, 1313 a patient tenders the issue of his physical health if he files an action for personal injuries "but only as to information that relates to the claimed injuries." In the instant case, the allegations of confidential information are not limited to the specific injuries at issue in the Geis lawsuit. In fact, it is specifically alleged that respondents obtained and used information *unrelated* to any issues in the Geis litigation.(CT 817-818, 1469-1470.)

In *Britt v. Superior Court* (1978) 20 Cal.3d 844, 862-865, and in *In Re Lifschutz* (1970) 2 Cal.3d 415, 430-436, our Supreme Court held that careful balancing and evaluation is required to determine the scope of a waiver of the physician/patient privilege resulting from litigation. In both of those cases, the Supreme Court made it clear that a blanket waiver of all confidentiality does not result from the filing of a lawsuit tendering a medical condition. Thus, even if Civil Code section 47(b) were applicable, that section would have to give way to the constitutional right of privacy, and respondents' demurrers should have been overruled.

This conclusion is bolstered by the distinction noted by the court in *Heda v. Superior Court* (1990) 225 Cal.App.3d 525, 530, when the court recognized that privacy rights may be waived, but stressed that "waivers of constitutional rights are not lightly found." In *Jones v. Superior Court* (1981) 119 Cal.App.3d 534, 547, the court noted that the scope of the waiver should be determined by reference to the purpose of the privilege, which is to

preclude the humiliation of the patient that might follow disclosure of his ailments. Thus:

> "It may be appropriate to say, for example, that petitioner is no longer in a position to invoke the privilege with respect to communications concerning prescription of DES for subsequent pregnancies; but it does not follow that she retains no interest in the confidentiality of other portions of her medical history, even assuming that history is relevant, as defendants contend, to the resolution of the factual issues posed in the litigation." (*Id.* at p. 548.)

For these reasons, it does not follow that merely because appellant sued Dr. Geis, she automatically waived all of her privacy rights in connection with her medical history. Moreover, the Fourth Amended Complaint and the Proposed Fifth Amended Complaint allege very clearly that appellant entrusted private and intimate information to YAMAGUCHI and BORO which was outside the scope of her lawsuit against Dr. Geis. (CT 817-818, 1469-1470.) The contention that the Geis lawsuit automatically effected a waiver, such that YAMAGUCHI was free to disclose appellant's entire medical and related history to the world at large, is not supported by the contents of the complaints and does not furnish a basis for sustaining the demurrers.

Since a blanket waiver cannot be found as a matter of law, it cannot be determined at the demurrer stage that the immunity of Civil Code section 47(b) must apply. In other words, because there are potential issues for a finder of fact concerning whether appellant waived her privacy rights, there are also potential issues concerning

whether those privacy rights will prevail over the immunity of Civil Code section 47(b). If appellant has not waived her privacy rights, the case law is clear that those privacy rights will prevail over Civil Code section 47(b) and that none of the respondents will be entitled to claim immunity based upon Civil Code section 47(b). (See *Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836, 847-848; *Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, 1141.)

* * *

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

DORIS HELLER, Plaintiff and Appellant, vs. NORCAL MUTUAL INSURANCE COMPANY, et al. Defendants and Respondents.	5 Civil No. F015875 Fresno County Superior Court No. 405369-0
DORIS HELLER, Petitioner, vs. SUPERIOR COURT, FRESNO COUNTY Respondent, NORCAL MUTUAL INSURANCE CO., et al., Real Parties in Interest.	

APPELLANT'S REPLY BRIEF

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

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* * *

IV.

APPELLANT'S CONSTITUTIONAL RIGHT OF PRIVACY OVERRIDES CIVIL CODE SECTION 47(b)

Respondents have suggested that some form of a balancing test be used in determining whether wrongful communicative conduct, in violation of the physician-patient privilege and therefore in violation of the Constitutional right of privacy, shall be given immunity under Civil Code section 47(b). While right of privacy objections must be determined in discovery based upon the balancing test, such test is not appropriate in assessing whether a cause of action is to be given immunity under Civil Code section 47(b). It has already been clearly and directly held, in *Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836, 847-848, that the Constitutional right of privacy automatically outweighs the privilege of Civil Code section 47(b). As the *Cutter* court stated, at 183 Cal.App.3d 848:

> We have determined that the Constitutional right to privacy outweighs the policies underlying the judicial proceedings immunity when private material is voluntarily published, without resort to a prior judicial determination.

This holding has been reaffirmed in *Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, 1141, in which the *Cutter* holding was applied to a medical doctor. Thus, the liability of Yamaguchi and Boro for their communicative acts in violation of the physician/patient privilege is not given immunity under Civil Code section 47(b).

V.

APPELLANT'S FILING OF HER LAWSUIT AGAINST DR. GEIS DID NOT EFFECT A BLANKET WAIVER OF ALL CONFIDENTIAL COMMUNICATIONS WITH HER PHYSICIANS

Respondents have sought to avoid the implications of *Cutter v. Brownbridge* and of *Torres v. Superior Court* by arguing that because she sued Dr. Geis for personal injuries, appellant effected a blanket waiver of all her confidential communications to all her treating physicians. Case law does not support that position. Instead, the cases indicate that there is no such blanket waiver, and that a patient/litigant only consents to a limited waiver of medical information which relates to the injuries for which recovery is sought. (See *Britt v. Superior Court* (1978) 20 Cal.3d 844, 862.) Thus, in *Britt*, a trial court discovery order was reversed where the order would have permitted inquiry into plaintiffs' private associational affiliations and activities and lifetime medical histories. The Supreme Court permitted inquiry only into medical information relevant to the claimed injuries. In the instant case, appellant alleges the wholesale disclosure of all private, intimate, financial, medical and other information, going far beyond legitimate discovery,

by the physician/respondents. Under *Britt*, appellant did not waive her right to privacy as to those materials.

Numerous cases recognize the limited character of the waiver by a patient/litigant. See, for example, *In re Lifschutz* (1970) 2 Cal.3d 415, 427, 431, 434-435; *Roberts v. Superior Court* (1973) 9 Cal.3d 330, 340-343 (waiver form signed by patient litigant authorizing release of "medical history, physical condition and treatment rendered" construed as limited only to reports and records regarding injuries resulting from the particular accident at issue); *Hallendorf v. Superior Court* (1978) 85 Cal.App.3d 553, 555-557 (plaintiff suing for personal injuries including unspecified general damages not required to disclose entire medical history); *Jones v. Superior Court* (1981) 119 Cal.App.3d 534, 547 (recognizing scope of waiver limited to particular injury tendered by party); *Heda v. Superior Court* (1990) 225 Cal.App.3d 525, 529-530 (holding defendant did not waive privacy rights by using health to change deposition and by testifying to heart problems, the court stating that waivers of Constitutional rights are not lightly found); *Slagle v. Superior Court* (1989) 211 Cal.App.3d 1309, 1313 (recognizing waiver only as to information which relates to the claimed injuries).

* * *

IN THE SUPREME COURT OF CALIFORNIA

DORIS HELLER, Plaintiff and Appellant, vs. NORCAL MUTUAL INSURANCE COMPANY, et al. Defendants and Respondents.	Case No. S-034539 (FIFTH DISTRICT COURT OF APPEAL NOS. 5 CIVIL F015875 AND F016047)
DORIS HELLER, Petitioner, v. FRESNO COUNTY SUPERIOR COURT, Respondent.	(Fresno County Superior Court No. 405369-0)
NORCAL MUTUAL INSURANCE COMPANY, et al. Real Parties in Interest.	

ANSWER TO PETITION FOR REVIEW

AFTER A DECISION BY THE FIFTH DISTRICT COURT OF APPEAL

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* * *

ARGUMENT

I.

THE COURT OF APPEAL PROPERLY DETERMINED THAT INFORMAL COMMUNICATIONS WITH PHYSICIANS WHICH VIOLATE A PATIENT'S RIGHT OF PRIVACY (PHYSICIAN/PATIENT PRIVILEGE) MAY CREATE CAUSES OF ACTION FOR VIOLATION OF THE CONSTITUTIONAL RIGHT OF PRIVACY AND/OR CIVIL CODE SECTIONS 56.10 ET SEQ., WHICH ARE NOT BARRED BY CIVIL CODE SECTION 47(b)

The Court of Appeal's decision followed longstanding tradition in this country and this state of protecting the right of privacy of individuals. The court's analysis did not depart from, but rather implemented, well established legal precedent. The right of privacy protected in our state and federal Constitutions is one of the primary values in our society, and that right is particularly applicable to medical information:

> The significance of a patient's personal privacy rights with respect to medical matters is accorded special protection by the Legislature. (Evid. Code, section 990 et seq. [Physician-Patient Privilege], Civ. Code section 56 et seq. [Confidentiality of Medical Information Act].)

> In addition, the California voters in 1972 amended article I, section 1 of our state Constitution to include among the various "inalienable rights" that of "pursuing and obtaining . . . privacy." The "zones of privacy" created by this amendment "extend to the details of one's medical history" (Citation.), " ' . . . an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized . . . ' " (Citation.) (*Gross v. Recabaren* (1988) 206 Cal.App.3d 771, 782.)

That a violation of a patient's Constitutional right of privacy should prevail over a statutory immunity, such as Civil Code section 47(b), is not surprising but inevitable considering the superior legal status of a Constitutional provision:

> The right of free speech guaranteed by the state and federal Constitutions does not permit violation of the right of privacy. It most surely follows that the privilege created by Civil Code section 47(3) [another subdivision of the statute relied on by defendants herein], *a statute, and thus a law of lesser organic force,* cannot be expanded to permit violation of that same right of privacy. Whatever privilege is accorded defendants under Civil Code section 47(3), it must yield to the plaintiffs' Constitutional rights of privacy. (*Rancho La Costa, Inc. v. Superior Court* (1980) 106 Cal.App.3d 646, 667; emphasis added; cited in the Opinion, p. 22 in the instant case.)

That the causes of action for violation of Civil Code sections 56.10 et seq. are not barred by Civil Code section 47(b) is similarly inevitable. Civil Code sections 56.35 and

56.36 provide remedies for violations of Civil Code section 56.10 et seq. Therefore, by basing her claims upon that act and its remedies, the plaintiff has stated viable causes of action squarely within the holdings of *Kimmel v. Goland* (1990) 51 Cal.3d 202, 212, and *Ribas v. Clark* (1985) 38 Cal.3d 355, 364-365. In *Kimmel*, there was wiretapping which violated Penal Code section 632 and resulted in information used in connection with a judicial proceeding. Penal Code section 637.2 provided a statutory remedy for the violation of Penal Code section 632. The court held that the plaintiff stated a cause of action for the statutory remedy, to which the plaintiff became entitled immediately and before the use of the information in the judicial proceeding. Accordingly, Civil Code section 47(2) [now 47(b)] afforded no immunity. The same statutory violation and remedy led to the same result in *Ribas v. Clark*.

In the instant case, the statutory remedy was contained within Civil Code section 56 et seq., but the principle is identical to that implemented in *Kimmel* and *Ribas*. Because the statute provides for an immediate remedy, the plaintiff's right of recovery accrued *immediately* upon the violation of Civil Code section 56.10, and did not depend upon the subsequent use of the information involved in a judicial proceeding. Therefore, the bar of Civil Code section 47(b) does not reach the cause of action predicated on the statutory violation. Stated differently, the causes of action based on the remedies provided by the Confidentiality of Medical Information Act set forth claims independent of any injury plaintiff may have suffered by use of the information in the Geis litigation. (See Opinion, p. 18.)

In briefing at the appellate court level, the defendants who now complain of the Court of Appeal's holding based on the Confidentiality of Medical Information Act, did not even challenge the applicability of that act or the plaintiff's contention that her causes of action based thereon were not barred by Civil Code section 47(b). Defendants only argued that the Act did not apply because of "waiver" or because of Civil Code section 56.10(c)(4). (See Appellant's Reply Brief, p. 21; NORCAL Brief, pp. 25-29; YAMAGUCHI Brief, pp. 21-23.) The "waiver" argument, which reduces to an evaluation of the scope of the waiver, was appropriately disposed of by the Court of Appeal's focus on the *improper method* through which the defendants acquired information on the plaintiff. (See Opinion, pp. 23-25.) The defendants' reliance on Civil Code section 56.10(c)(4) was misplaced for the reason stated by the Court of Appeal at Opinion, p. 19. That subdivision is irrelevant because it only applies when the organizations or persons receiving the information "are engaged in reviewing the competence or qualifications of health care professionals or in reviewing health care services with respect to medical necessity, level of care, quality of care, or justification of charges." (See Opinion, p. 19.) Furthermore, the defendants have assumed, without justification, that any provider may furnish information concerning any other provider, when the statutory exception was designed for professional review of the same provider. (See Opinion, pp. 18-19; Appellant's Opening Brief, pp. 17-38.)

The fact that a select group of professionals may incur liability for violations of confidentiality in privileged relationships is not anomalous or unjust. Attorneys,

psychotherapists, tax preparers, and ministers, among others, have obligations to their clients to preserve client confidences. Our society has deemed it appropriate to provide privileges protecting communications between clients and such professionals. Certain professionals occupy sensitive positions due to their receipt of private and personal information of clients. When deemed appropriate by the Legislature, or the courts, or the Constitution, such communications are granted privileged status and are protected by the Constitutional right of privacy. The Court of Appeal's Opinion in the instant case is not only legally correct, but promotes the value of privacy within selected confidential relationships.

* * *

RULE 27. REHEARING IN COURT RENDERING DECISION

(a) [Power to grant rehearing] The Supreme Court or a Court of Appeal may grant a rehearing after its own decision in any cause except the denial by a Court of Appeal of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause or the denial of a transfer to a Court of Appeal in a case within the original jurisdiction of a municipal or justice court. A rehearing may be granted on petition, as provided in subdivision (b), or on the court's own motion before the decision becomes final.

(b) [Time for filing petition] A party seeking a rehearing either in the Court of Appeal or in the Supreme Court must serve and file a petition therefor within 15 days after the filing of the decision.

(c) [Time for filing answer] An answer may be served and filed within 23 days after the filing of the decision.

(d) [Form of petition and answer] Insofar as practicable, the petition and answer shall conform to the provisions of rule 15.

(e) [Determination of petition] An order of the Supreme Court granting a rehearing shall be signed by at least four judges assenting thereto, and filed with the clerk. If no order is made before the decision becomes final as provided in subdivision (a) of rule 24, the petition shall be deemed denied, and the clerk shall enter a notation in the register to that effect.

COURT OF APPEAL
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April 21, 1993

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Re: Nos. F015875 and F016047
Doris Heller v. Norcal Mutual Insurance Company et al.;
Doris Heller v. Superior Court; Norcal Mutual et al.
Oral Argument Scheduled For May 1993

Dear Counsel:

Although you may have earlier requested oral argument, the court, after consideration, is willing to accept submission of this case without oral argument. However, if either side desires oral argument, the case will remain on the calendar for such argument. If the court does not receive such a request from either side within 10 days from the date of this letter, the case will be removed from the calendar, oral argument will be deemed waived and the cause will be submitted on the record and briefs now on file.

Please send a copy of any request for oral argument to all other counsel.

Arguments contained in your briefs need not be orally presented unless you have something new to add. Supplementary authorities may be submitted by letter within 10 days from the date of this letter, whether or not oral argument is waived. Please do not simply list authorities. Indicate to which issue the cited authority pertains and briefly state what the authority holds.

Very truly yours,

/s/ Kevin A. Swanson
KEVIN A. SWANSON, Clerk